(23,460)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 398.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PURITAN COAL MINING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pennsylvania Railroad Company, appellant, and Puritan Coal Mining Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
b or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant, The Pennsylvania Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23d day of November, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

MAHLON PITNEY,
Associate Justice of the
Supreme Court of the United States.

c Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto Puritan Coal Mining Company in the full and just sum of One hundred and sixty thousand dollars, to be paid to the said Puritan Coal Mining Company, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of November in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately, at a term of the Supreme Court of the State of Pennsylvania, in a suit depending in said Court, between The Pennsylvania Railroad Company, appellant, and Puritan Coal Mining Company, appellee, a judgment was rendered against the said Pennsylvania Railroad Company and the said Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Puritan Coal Mining Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Pennsylvania Railroad Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY, [SEAL.]
By W. W. ATTERBURY, [SEAL.]
Vice President.

Attest:

J. TANEY WILCOX, [SEAL.]
Ass't Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,
By L. BERT NYE,
Resident Vice-President.

Attest:

PAUL N. CHERRY, [SEAL.]
Resident Assistant Secretary.

Sealed and delivered in presence of—

——— ———.
——— ———.

Approved by—

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

d UNITED STATES OF AMERICA, *ss:*

To Puritan Coal Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania, wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this 23d day of November, in the year of our Lord one thousand nine hundred and twelve.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

e On this third day of December, in the year of our Lord one thousand nine hundred and twelve, personally appeared Hazard A. Murray before me, the subscriber, Jno. H. Moore, Prothonotary of Common Pleas Court of Clearfield County, Pennsylvania, and makes oath that he delivered a true copy of the within citation to A. M. Liveright, Esq., of the firm of Krebs & Liveright, Attorneys for Puritan Coal Mining Company on the 30th day of November A. D. 1912.

HAZARD A. MURRAY.

Sworn to and subscribed the 3rd day of December, A. D. 1912.

[Seal Court of Common Pleas, Clearfield County, Pa.]

JOHN H. MOORE, *Proth'y.*

30 November 1912 served on us by copy.

PURITAN COAL MINING CO.,
By KREBS & LIVERIGHT, *Attorneys.*

1 Among the Records and Proceedings enrolled in the Court of Common Pleas in and for the county of Clearfield, in the Commonwealth of Pennsylvania, to No. 221 May Term, 1908, is contained the following:

Copy of Continuance Docket Entry.

M'ch 26″.

221.

PURITAN COAL MINING COMPANY

—

PENNSYLVANIA RAILROAD COMPANY.

Summons in Trespass.

Damages claimed not exceeding $75,000.

Ret. First Monday of April next. By endorsement on writ, Murray & O'Laughlin, Att'ys, accept service for Def't Company and direct their appearance to be entered of record. So ans.

CORNELIUS ALLEN, *Sh'ff.*

Nov. 21″ 1908.—Pl'ff's statement filed.

Dec. 18″ 1908.—Pl'ff by Att'y enters a rule on def't to plead in thirty days or in default Pro. to enter the plea of general issue. Acceptance of service endorsed.

M'c'h 10″ 1909.—Pro. enters plea of Not Guilty as per rule of court Sept. Term 1910, on trial list and continued.

Nov. 28″ 1910.—On trial list and continued by agreement. By the Court.

Apr. 3″, 1911.—By paper filed Pl'ff moves the Court to amend the præ. filed by stating the damages at Three Hundred Thousand Dollars instead of $75,000 and that the same amendment be permitted in the writ. By endorsement motion granted exceptions noted and Bill sealed by the Court.

April 10″ 1911.—Defendant's objection to amendment filed.

April 13, 1911.—Opinion and decree filed.

Amendment is allowed striking out clause Three there-
2 from and the same directed to be marked filed. Ex. noted and Bill sealed. By the Court.

April 13″ 1911.—Pl'ff's amended statement filed.

April 17″ 1911.—By paper filed Def't by its att'ys Murray & O'Laughlin pleads the statute of limitations to all of Pl'ff's claim not covered by its original statement.

June 5″ 1911.—Petition filed, Rule granted to show cause why action should not be dismissed, Ret. June 19″ 1911. Issue and service waived on Agt. List.

Jun 16″ 1911.—Pl'ff's answer filed.

June 27″ 1911.—Cause continued until next Term of Court.

July 20″ 1911.—Opinion in Decree filed. Rule discharged. By the Court.

Sept. 13″ 1911.—Pl'ff enters rule to take Depositions on ten days' notice.

Oct. 7″ 1911.—Depositions of J. S. Whitely on behalf of Pl'ff filed.

Oct. 7" 1911.—Depositions on behalf of Def't filed of J. S. Whitely.

Now, October 17" 1911, by paper filed the plaintiff and defendant agree in this case to waive trial by Jury and to submit the case to the Hon. Allison O. Smith, Prest. Judge without a jury to put the law and the facts within the Provisions of the Act of April 22" 1874. All rights to be preserved to each party that could accrue to either if the case were tried upon a Jury, with the request to present the same to the Court at the proper time. This is not intended to waive the question of jurisdiction heretofore raised by the defendant.

Sept. 13" 1911.—Pl'ffs enter rule to take depositions to be read at the trial of this case.

Dec. 29" 1911.—Testimony filed.

Dec. 29" 1911.—Findings of fact, law, opinion and verdict filed.

Dec. 29" 1911.—By endorsement Murray & O'Laughlin accept service of notice of filing of Opinion etc. for defendant.

Dec. 29" 1911.—By endorsement A. M. Liveright & A. L. Cole accept service of notice.

3 Now, December 29" 1911, in accordance with the above opinion verdict is directed to be entered in favor of the Plaintiff and against the Defendant in the sum of $74,323.88.

Verdict $74,323.88.

Entered December 29" 1911, Int. Dec. 29" 1911.

ROLL B. THOMPSON, *Pro.*

Jan. 26" 1912.—Def't- exceptions to decree of Court filed. On Agt. List.

Jan. 26" 1912.—Pl'ff's exceptions to decree of Court filed. On Agt. List, and set for argument Feb. 3" 1912, as per decree filed.

Feb. 12" 1912.—Additional exceptions filed by Def't by leave of Court.

Plaintiff's objections endorsed.

February 12" 1912.—Opinion and Decree filed.

Now February 12" 1912, All the foregoing exceptions both of the Plaintiff and the Defendant having been overruled, or where modified such modification not affecting the amount of damages, to which action of the Court as also to the entry of Judgment as hereafter directed at the request of the respective Counsel, exception is noted and Bill sealed. Further the Prothonotary is hereby directed to enter judgment in the above stated case in favor of the Plaintiff, The Puritan Coal Mining Company and against the Defendant, the Pennsylvania Railroad Company, in the sum of $74,323.88 with interest from December 29th 1911. By the Court.

Debt $74,323.88.

Filed and Interest from Dec. 29" 1911.

Judgment.

JOHN H. MOORE,
Prothonotary.

Feb. 21" 1912, Bond filed in the sum of $160,000.00 for appeal to Supreme Court with the American Surety Company of New York as surety.

Feb. 21" 1912 Bond approved by the Court.

Feb. 21" 1912 Certiorari from the Supreme Court filed on the part of the Penna. R. R. Co. Ret. 3rd Monday of April 1912.

4 Rule on appellee to appear and plead on the return day of this writ. Feb. 21" 1912 By endorsement Service accepted by A. L. Cole and A. M. Liveright for Pl'ff Company.

5 In the Common Pleas Court of Clearfield County, Penna., May Term, 1908.

No. —.

PURITAN COAL MINING COMPANY
versus
PENNSYLVANIA RAILROAD COMPANY.

To Roll B. Thompson, Esq., Proth'y:

Issue Summons in Trespass. Damages claimed not exceeding $75,000—writ returnable 1 Monday April 1908.

KREBS & LIVERIGHT,
Att'y for Pl'ff.

Endorsement: No. 221 May Term 1908—Puritan Coal Mining Co. v. Penna. R. R. Co.—Præcipe—Filed Mar. 26 1908, Roll B. Thompson, Prothonotary—2.00 by Att'y. K. & L., Att'ys.

6 *Summons.*

CLEARFIELD COUNTY, *ss:*

The Commonwealth of Pennsylvania to the Sheriff of said County, Greeting:

We command you, That you summon Pennsylvania Railroad Company so that they be and appear before our Court of Common Pleas, to be holden at Clearfield, in and for said County, on the first Monday of April next, then to answer Puritan Coal Mining Company of a plea in Trespass Damages, not exceeding $75,000. And have you then and there this writ.

Witness, The Hon. Allison O. Smith, President of our said Court, at Clearfield, Pa., the 26 day of March, Anno Domini one thousand nine hundred and eight.

[SEAL.] ROLL B. THOMPSON,
Prothonotary.

Now March 26, 1908 we accept service of this writ for defendant company and direct our appearance to be entered for defendant company.

MURRAY & O'LAUGHLIN,
Att'ys for P. R. R. Co.

Now March 26, 1908, I return this writ service accepted by Murray & O'Laughlin, Attorneys for the defendant as per endorsement. So answers Cornelius Allen, Sheriff.

Endorsement: No. 221 May Term 1908—Puritan Coal Mining Co. v. P. R. R. Co.—Sheriff Allen 2.50—Summons—K. & L. Attorney.

7 In the Court of Common Pleas of Clearfield County, Pennsylvania, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD.

Plaintiff's Statement.

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action, alleges as follows, viz:—

First. That the Puritan Coal Mining Company is a corporation organized and existing under the laws of Pennsylvania, and from the — day of A. D., 1902, to the — day of —— A. D., 1908, was the owner of a leasehold upon a large body of bituminous coal, situate in the County of Cambria, State of Pennsylvania, and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom, to points and places within the territorial limits of Pennsylvania.

Second. That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania, by an Act of Assembly approved the 13th day of March, 1846, and is by virtue of the laws and constitution of the said State, a common carrier engaged in the transportation of passengers and property, under a common control, management or arrangement for a continuous carriage or shipment from points and places within the State of Pennsylvania, to other points and places within the said State, and was and is engaged in carrying, hauling and transporting bituminous coal from points and
8 places along its main line and branches within said State, to other points and places within said State.

Third. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company are situated along or near the line or branch line of the defendant company in the County of Cambria, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff during the period from the 1st day of April, A. D. 1902, to the 1st day of Jany. A. D., 1905, was shipped over said main line and branch of the defendant company by continuous carriage or shipment, and under the control and management of the

defendant company, to points and places within the State of Pennsylvania.

Fourth. That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine, and published the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product, and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines.

Fifth. That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the
9 measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant had for daily distribution; but the defendant company disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with its pro rata share of the coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice, in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars, distribute and give to said company five hundred (500) cars before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received, except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company.

Sixth. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, one thousand (1000) steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate markets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale deprive the plaintiff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines, to points and places within the State of Pennsylvania.

Seventh. That during all of said period of time, to wit,
10 from the 1st day of April, A. D., 1902, to the 1st day of January, A. D. 1905, the plaintiff had a large and growing

demand for the soft coal which it was mining and producing; that it had during all of said time constant demand and orders for its coal, in excess of the supply of coal cars furnished by the defendant campany for transportation of the same to its customers, and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 64587 tons, which it would have sold to its customers therein at a price aggregating F. O. B. cars above costs of producing same the sum of $49,906.07 Dollars; but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That because of said undue and unreasonable discriminatory acts, the plaintiff suffered damage and loss in its business of mining and selling its product in the markets of the soft coal trade and in points and places and to consumers of soft coal within the lines of the State of Pennsylvania and it, therefore, brings this action to recover compensation for said loss and damage in the sum of $49,936.07 Dollars, with such additional amount as will compensate plaintiff for the delay on part of the defendant Company.

KREBS & LIVERIGHT, *Att'ys.*

Endorsement: No. 221 May Term 1908—Puritan Coal Mining Co. versus Penna. R. R. Co.—Pl'ff's statement—Filed Nov. 21, 1908, Roll B. Thompson, Prothonotary—K. & L., Att'y-.

11 In the Court of Common Pleas of Clearfield County, Pennsylvania, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
versus
PENNSYLVANIA RAILROAD COMPANY.

To Murray & O'Laughlin, Esqs., Attorneys for Defendant:

You are hereby notified that the plaintiff's statement in the above case has been filed in the Prothonotary's Office, and that you are required to enter your plea within thirty (30) days from service hereof; in accordance with the provisions of rules of Court Nos. 114 and 115; and that in default of your entering a plea, the Prothonotary will be required to enter the plea of the general issue.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

Now, Dec. 15, 1908, Service accepted for Def.
MURRAY & O'LAUGHLIN,
Attorneys for Def't.

Endorsement: No. 221 May Term 1908—Puritan Coal Mining Co. v. Penna. R. R. Co. Rule to plead.—K. & L. Filed December 18, 1908.—Roll B. Thompson, Prothonotary.

12 In the Court of Common Pleas of Clearfield County, Pennsylvania, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD COMPANY.

And Now, 3 April 1911, the Plaintiff by its attorneys Krebs & Liveright, moves the Court for leave to amend the præcipe filed in the above stated case, by stating the damages at Three Hundred Thousand Dollars instead of Seventy-five Thousand Dollars as they were originally stated, and that the same amendment be permitted in the writ.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

3 April 1911 leave granted to amend præcipe and writ in the above case by laying the damages at Three hundred Thousand Dollars as prayed for.

——— ———.

Endorsement: No. 221 May Term 1908—Puritan Coal Mining Co. v. Pennsylvania R. R. Co.—Motion to Amend Præcipe and Writ.—April 3, 1911, Motion granted, and upon request of Att'y for Def't. Exceptions noted and bill sealed. By the Court. Per Roll B. Thompson, Proth'y.—K. & L.

13 In the Court of Common Pleas of Clearfield County, Pennsylvania, September Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Objection by Defendant to Amendment Asked for by Plaintiff.

Now April 10" 1911, defendant by its attorneys objects to the allowance of amendment asked for by plaintiff for the following reasons:

First. That the changes introduced by plaintiff's proposed amended statement are not authorized by the statutes of amendments.

Second. Because said amended statement proposes to introduce new causes of action from those averred and set forth in plaintiff's original statement.

Third. Because said proposed amended statement embraces new causes and grounds of action not averred and set forth in plaintiff's original statement, and this after the bar of the statute had intervened upon all the causes of action averred in plaintiff's original statement.

Fourth. For the the same reasons defendant excepts to the application to amend the præcipe and writ.

MURRAY & O'LAUGHLIN,
For Defendant.

Endorsement: No. 221 May Term 1908—Puritan Coal Mining Co. v. Penna. R. R. Co.—Objections to amendment—Filed April 10, 1911. Roll B. Thompson, Prothonotary.—M. & O'L.

14 In the Court of Common Pleas of Clearfield County, May Term, 1908.

No. 221.

PURITAN COAL MINING CO.
vs.
PENNSYLVANIA RAILROAD CO.

Sur Motion for Leave to File Amended Statement.

Opinion and Decree on Allowance of Amended Statement.

Defendant objected to the allowance of the amendment asked for, for the following reasons: "First. That the changes introduced by plaintiff's proposed amended statement are not authorized by the statutes of amendments. Second. Because said amended statement proposes to introduce new causes of action from those averred and set forth in plaintiff's original statement. Third. Because said proposed amended statement embraces new causes and grounds of action not averred and set forth in plaintiff's original statement and this after the bar of the statute had intervened upon all the causes of action averred in plaintiff's original statement. Fourth. For the same reasons the defendant excepts to the application to amend the præcipe and writ."

This amended statement followed the allowance by the Court of the amended præcipe and writ so as to state the amount of damages larger than that in the original præcipe and writ.

An examination of the plaintiff's amended statement convinces us that the third clause thereof does introduce a new cause of action and it being more than six years since the right of action accrued that amendment, so far as covered by said third clause, cannot be allowed. The original statement declares wholly on discriminatory acts of the defendant, naming the persons and corporations in whose favor the defendant Company discriminated as against the
15 plaintiff. The third clause of the amended statement declares wholly not upon discrimination but upon a violation

of its constitutional, statutory and common law duty of furnishing "an adequate and sufficient number of cars to meet its requirements." The amendment, so far as said third clause is concerned, is therefore not allowed.

The balance of the amended statement follows in language the original declaration, except, first, as to excluding in several clauses thereof words and sentences respecting haulage or shipments made to points and places within the State of Pennsylvania; and second, in elaborating the results of alleged discrimination and in setting up a very much larger discriminatory tonnage of coal and in consequence a very much larger claim for damages. At first blush it would seem as though the amended statement were an attempt to declare for coal belonging to that class of tonnage traffic called interstate, while the original declaration, in using the words confining it to shipments within the State of Pennsylvania, confined recovery to that class of tonnage traffic known as intrastate. The learned Counsel for plaintiff, however, denies such purpose or intention, and it is clear that the law will not permit a recovery for interstate shipments, so that even though the amendment were allowed any attempt to recover for distinctly interstate shipments will not be allowed by the Court on trial. In other words, the amendment will not avail them for such purpose. The words with reference to the State of Pennsylvania in the original statement, are excluded from the amended statement it is claimed merely because they are surplusage. With this view of the case there perhaps is no harm in allowing the amendment so far as the exclusion of the reference to the State of Pennsylvania is concerned.

The principal objection made by the learned Counsel for the defendant to the statement is, that a new cause of action is in-
16 troduced by the amended section eighth, corresponding to section seventh of the original statement. A careful examination of both statements convinces us that no new cause of action is in fact declared on. In both two particulars acts of discrimination are alleged, namely, first, the distribution to Berwind-White Coal Mining Company daily of 500 cars before any distribution made of a pro rata to the plaintiff Company; and second, the sale by the defendant Company to Berwind-White Coal Mining Company of 1,000 steel cars of large capacity, thereby depriving the plaintiff of its pro rata percentage of said cars. Both statements cover the same period of time and allege identically the same discriminatory acts. In the original statement, however, plaintiff alleges a certain definite number of tons of coal which it could have shipped in excess of what it did ship, being prevented so to do by reason of the alleged two undue and unreasonable acts of discrimination in favor of Berwind-White Coal Mining Company. In the amended statement, although in somewhat different language, the same allegation is made, that is, that it could have mined and shipped a large amount of coal in excess of what it did mine and ship and claims for the profit thereon as in the original statement, except that it claims for a very much larger amount of tonnage which it was deprived from shipping by reason of the discriminatory acts of the defendant and in conse-

quence declares for a much larger sum of money. We are of opinion, therefore, that all that portion of the amended statement exclusive of section three is allowable. The cause of action, in our judgment, is the same, that is, two certain alleged discriminatory acts. The amendment appears to declare merely on the consequences of those discriminatory acts and alleges aggravation of the injury, in that they were prevented from shipping a larger amount of ton-
17 nage and therefore entitled to a larger amount of damage than was claimed for in the original statement.

In Knapp vs. Hartung, 73 Pa. St. 290-294 is a case almost identical in principle with the case in hand. In that case the Supreme Court reversed the lower Court for striking off amendments declaring for a number of additional items, on the ground that both statements were based on the same cause of action, namely, the breaking of the close. That case also lays down the principle that the amendment acts must receive a liberal construction. In a number of cases in Pennsylvania, where the amended statement did not vary from the original statement in an allegation as to the particular language, action or acts alleged as the basis of recovery, but where the mode of stating the complaint or of setting out the circumstances together with a statement of the consequences and aggravation of the injury sustained has been modified or amended, such amendments have been allowed by the lower Courts and sustained by the higher Courts. Jackson vs. Gunton, 26 Superior Court 203. Herbstritt vs. Lackawanna Lumber Co. 212 Pa. St. 495. Fredericks vs. Penna. Canal Co. 148 Pa. St. 317. Very recent cases recognizing this principle are Call vs. Westinghouse Co. 230 Pa. St. 86 (in Advance Reports 17 March 1911. First National Bank vs. Slate Co. 229 Pa. St. 227 (in Advance Reports November 18th, 1910.) Amended statements increasing claim for damages are permitted. See Tassey vs. Church 4 Watts & Sargent 141. Clark vs. Herring, 5 Binney 133. Stainer vs. Insurance Co. 13 Superior Court 25.

The cases relied on by the learned Counsel for Defendant are clear cases where the amended statement introduced new or different causes of action barred by the statute. Allen vs. Tuscorora Valley Railroad Co. 229 Pa. St. 97 (in Advance Reports November 25th, 1910) was where the original declaration alleged negligence of the defendant Company in failing to comply with its duty of
18 furnishing car couplers of reasonable safety, while the amended declaration alleged that the defendant corporation was engaged in interstate commerce and as a common carrier so engaged failed to equip its cars as required by an Act of Congress. This was held to be introducing a new cause of action barred by the statute, and of that there can hardly be two opinions. In Philadelphia vs. Railroad Co. 203 Pa. St. 38, cited by Counsel, the suit was by the City against the Railroad Company to recover the cost of paving streets occupied by the tracks of the Company. The original statement did not aver any charter, contractual or statutory obligation on the Railroad Company to pay the cost of paving the streets, and hence when the City, after the statute of limitations had run

against its claim, attempted to amend its statement so as to aver that the defendant Company had by lease or merger acquired the franchises and assumed the burden of another railway company which had the obligation of paving the streets, it was held that such averment introduced an entirely new cause of action. In Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co., manuscript opinion by Ferguson, J. July 13th, 1910, in the Court of Common Pleas No. 3 of Philadelphia to No. 545 March Term, 1905, the attempted amendment was the introduction of other and different names of companies or corporations in favor of whom the defendant Company had discriminated as against the plaintiff Company, and hence is not this case.

Here, as before stated, two distinctive alleged discriminatory acts are averred, exactly similar in both the original and amended statements. The effect, consequences or results of those acts is made a matter of amendment and of an enlarged claim for damages. We fail to see where any new cause of action is alleged. The amendment is therefore allowed, striking out clause three there-
19 from, and the same directed to be marked filed. At the request of Counsel for defendant, exception is noted and bill sealed.

By the Court.

ALLISON O. SMITH, *P. J.*

Clearfield, Pa., April 13th, 1911.

Endorsement: No. 221 May Term 1908. Puritan Coal Mining Company v. Pennsylvania Railroad Company. Opinion. Filed Apr. 13, 1911. Roll B. Thompson, Prothonotary.

20 In the Court of Common Pleas of Clearfield County, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
against
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Amended Statement.

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, to wit:

First. That the Puritan Coal Mining Company is a corporation organized and existing under the Laws of Pennsylvania, and from the — day of —— A. D., 1902, to the — day of —— A. D., 1908, was the owner of a leasehold upon a large body of bituminous coal situate in the County of Cambria, State of Pennsylvania; and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom to various points and places;

Second. That the Pennsylvania Railroad Company is a corporation existing under the Laws of Pennsylvania by an Act of Assembly approved the 13th day of March, 1846, and is by virtue of the laws and constitution of the said State a common carrier engaged in the transportation of passengers and property, and was and is engaged in carrying, hauling and transporting bituminous coal; and undertook and agreed, in consideration of the franchises to it granted by the Commonwealth of Pennsylvania, to give and grant unto the plaintiff the facilities necessary for the trans-
21 portation of its coal to market without discrimination in favor of other companies, corporations or individuals; and to furnish it with cars and motive power without any preference to other companies, corporations or individuals; but the defendant has failed and refused to perform its duty thus imposed upon it in the manner and to the extent hereinafter narrated;

Third. That under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches, for the accom-odation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches; and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from bituminous coal regions tributary, as aforesaid, to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere; and to let and hire the same unto the plaintiff in this action. That the defendant company did not, as required by law, provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations, mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market, during the ordinary
22 conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and caused to be transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit:

damage in the sum of Two Hundred Sixty Thousand Seven Hundred seventy-seven and 96/100 Dollars.

Fourth. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially of the Berwind-White Coal Mining Company, are situate along or near the line, or branch line, of the defendant company in the County of Cambria, and adjoining counties, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff, during the period from the 1st day of April, 1902, to the 1st day of January, 1905, was shipped over said main line and branches of the defendant company;

Fifth. That the defendant company, during all of the period aforesaid, arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine and publish the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product; and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and it so fixed and determined the percentage of coal cars the
23 said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines:

Sixth. That the duty and obligation of the defendant company, as a common carrier and a public highway, was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number that defendant had for daily distribution; but the defendant company, disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with the pro rata share of coal cars which it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars distribute and give to said company five hundred cars (500) before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day which the percentage fixed by the defendant company entitled the plaintiff to receive, and which it would have received except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company;

Seventh. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of the said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause, to be transferred from its ownership, custody and control, to
24 the said Berwind-White Coal Mining Company, one thou-

sand (1,000) steel cars of large capacity, which it, the defendant, had purchased for use in the transportation of bituminous coal, and did by said transfer and sale deprive the plaintiff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines;

Eighth. That during all of said period of time, from the 1st day of April, 1902, to the 1st day of January, 1905, the plaintiff had a large and growing demand for the said coal which it was mining and producing; that it had, during all of said time, constant demand and orders for its coal in excess of what could be moved in the supply of coal cars furnished by the defendant company for transportation of the same to plaintiff's customers, and it could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, all of which it could and would have sold at a price aggregating f. o. b. cars, above the cost of producing same, the sum of Two Hundred Sixty Thousand Seven Hundred seventy-seven and 96/100 Dollars ($260,777.96); but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That said sum of $260,777.96 aggregates the reasonable profit that plaintiff could and would have made upon the coal it reasonably could and would have shipped from its mines in the following amounts, but for defendant's discriminatory acts:

In 1902	68,501 tons
In 1903	146,234 tons
In 1904	83,747 tons

and because of said undue and unreasonable discriminatory acts of the defendant, hereinbefore narrated, the plaintiff suffered damage and loss in its business of mining and selling its product, as hereinbefore set forth, and it therefore brings this action to recover from the defendant compensation for said loss and damage in the sum of $260,777.96, with such additional amount as will compensate plaintiff for the delay on the part of the defendant company.

KREBS & LIVERIGHT,
Attorneys for Plaintiff.

Endorsement: No. 221, May Term, 1908—Puritan Coal Mining Company vs. Pennsylvania Railroad Company—Plaintiff's Amended Statement—Filed Apr. 13, 1911. Roll B. Thompson, Prothonotary—K. & L.

26 In the Court of Common Pleas of Clearfield County, Penna., September Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Action for Discrimination.

Now April 17th, 1911, defendant by its attorneys hereby pleads the statute of limitation as to all of plaintiff's claim not covered by its original statement.

MURRAY & O'LAUGHLIN,
Solicitors for Defendant.

Endorsement: No. 221. May Term, 1908—Puritan Coal Mining Company vs. Pennsylvania Railroad Company—Defendant's Plea—Filed April 17, 1911. Roll B. Thompson, Prothonotary—M. & O'L.

27 C. P., Clearfield County, Pa., May Term, 1908.

No. 222.

PURITAN COAL MINING COMPANY
VS.
THE PENNSYLVANIA RAILROAD CO.

Petition to Dismiss Action for Want of Jurisdiction.

The Pennsylvania Railroad Company, the Defendant, in the above entitled action, respectfully moves the Court to dismiss the same for the following reasons:

1. It is a corporation organized and existing under the Laws of the State of Pennsylvania, owning and operating a line of railroad in that State and also in the States of New York and New Jersey, and is engaged in the transportation of passengers and freight between points in said States, and is, therefore, subject to the provisions of the Act of Congress, approved February 4, 1887, entitled, "An Act to Regulate Commerce," and the Acts amendatory thereof and supplementary thereto.

2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with such transportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be made both

to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments.

3. During the period of the action and prior thereto it
28 had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated or prescribed by the shippers loading them without regard to the consideration whether these destinations were points beyond or within the State of Pennsylvaia.

4. The Acts to regulate commerce above referred to by their terms prohibit unlawful or unjust discrimination in the distribution by any railroad company subject to their provisions of its available equipment, and your petitioner is advised by counsel, and therefore avers, that by reason of the paramount authority possessed by the Congress of the United States in respect to any matter concerning which it is empowered to legislate, the provisions of the said Acts in relation to such discrimination are controlling, and that the remedies for violation thereof which are prescribed in and by said Acts are consequently exclusive of all others.

5. It results from this, as your petitioner is advised and avers, that actions for the recovery of damages based upon disregard of provisions of the said Acts prohibiting discrimination in the allotment or distribution by a railroad company or carrier of any of its equipment are cognizable solely in the tribunals which the said Acts designate and prescribe as those in which such actions shall be maintained, and these tribunals are the Courts of the United States and the Interstate Commerce Commission, jurisdiction between the two being apportionable as prescribed in the said Acts.

29 6. Wherefore, your petitioner showing that this court is without jurisdiction to entertain the present action, prays that an order may be made dismissing the same.

THE PENNSYLVANIA RAILROAD COMPANY,
By W. H. MYERS, *Vice-President.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis, Neilson, being duly sworn, according to law, deposes and says: That he is the Secretary of the Pennsylvania Railroad Company, the defendant in the above entitled action. That the facts set forth in the above motion are true, and that the said motion has not been made for the purpose of delay.

LEWIS NEILSON.

Sworn and subscribed before me this 20th day of May, A. D. 1911.

[SEAL.] H. E. CAIN,
Notary Public.

Commission expires February 21, 1915.

Endorsement: 222. May Term, 1908.—Puritan Coal Mining Co. v. P. R. R. Co.—Petition to dismiss.—Now June 5, 1911, rule is granted as prayed for, returnable on June 19, 1911.—By the Court. Allison O. Smith, P. J.—Filed Jun- 5, 1911. Roll B. Thompson, Clerk.—Murray & O'Laughlin, Att'ys for Def. 5 June, 1911, service accepted and issue of rule waived. Krebs & Liveright, Att'ys for Pl'ff.

30 In the Court of Common Pleas of Clearfield County, Pennsylvania, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
v.
PENNSYLVANIA RAILROAD CO.

Plaintiff's Answer to Rule to Dismiss Action.

To the Honorable Allison O. Smith, President Judge:

The plaintiff, Puritan Coal Mining Company, making answer to the rule in the above case, and to the matters averred in the petition on which it is founded, respectfully says:

1. The matters set forth in paragraph one are believed to be true, and those alleged in paragraphs two and three of the petition are purely defensive and not material at this stage of the cause, even if true. Their truth can be determined only on the trial.

2. That the force and effect of the Act to Regulate Commerce, approved February 4, 1887, and the supplements and amendments thereto, in no way concern this case at this stage, and the attempt by defendant to interject the same is palpable design to confuse.

3. That the matters averred in the fifth paragraph of the petition are purely academic, and assume a state of facts to exist that is not yet proven, and cannot be in proof until trial had.

4. That it denies that this court is without jurisdiction to entertain the present action, and avers that the allegations of the petition are entirely matters of defense after plaintiff's testimony shall have been presented.

5. That defendant's entire petition is premature and without warrant of law, is an effort to have the Court prejudge the case without any proofs having been made therein, seeks to have the court
31 give binding instructions for defendant without a jury even sworn, and is otherwise irregular.

6. That the Act of Congress of February 4, 1887, and its supple-

ments and amendments do not and cannot apply to the matters for which suit is brought in this action.

7. That even if the allegations of fact contained in the petition were true as stated, defendant has shown nothing thereby to defeat the jurisdiction of the Common Pleas of Clearfield County.

Wherefore the plaintiff moves the Court to discharge the rule herein granted.

PURITAN COAL MINING CO.,
By ADOLPHE RAFTER, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

Adolphe Rafter, being duly sworn according to law, deposes and says that he is the secretary of the Puritan Coal Mining Company; that the matters of fact set out in the above answer are true, and the matters of law therein stated he is advised are true.

ADOLPHE RAFTER.

Subscribed and sworn before me this 14th day of June, 1911.

GEO. L. LEWIS,
Notary Public.

Cert. filed in New York County, N. Y.

Endorsement: #221 May Term 1908. Puritan Coal Mining Co. vs. Pennsylvania Railroad Co. Plaintiff's Answer to Rule to Dismiss Action. Filed June 6, 1911. Roll B. Thompson, Prothonotary. Krebs & Liveright.

32 In the Court of Common Pleas of Clearfield County, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY.
v.
THE PENNSYLVANIA RAILROAD CO.

Sur Motion and Rule to Dismiss Action.

Opinion & Decree on Rule to Dismiss Action.

The action in trespass docketed to the above stated number and term was begun March 26th, 1908, and Plaintiff's Statement filed November 21st of that year. On December 18th, 1908, Plaintiff served rule on Defendant to plead within thirty days, and no plea being entered, on March 10th, 1909, the Prothonotary entered plea of not guilty, as per rule of Court. At September and December Terms, of 1910, the case was on the trial list and continued. On April 3rd, 1911, leave was granted by the Court, on motion, to

amend the Præcipe and writ enlarging claim, and on April 13th, 1911, an amended statement was filed, to which the defendant, on April 17th, filed exceptions and also a plea of the statute of limitations as to that portion of the claim in excess of the original statement. The case was again on the trial list for May Term, continued first until July 10th and later continued generally. On June 5th, 1911, Defendant presented petition to dismiss, upon which the pending rule was granted.

Said petition alleges, inter alia, in paragraph- second and third as follows:

"2. During the period of the present action and prior thereto it was engaged, inter alia, in transporting in interstate commerce coal mined by a large number of mine owners and operators located along its lines within the State of Pennsylvania, among whom was the plaintiff in the present action, and that in conjunction with such transportation it was also engaged in the transportation of coal exclusively within the State of Pennsylvania for such owners and operators. That for the purpose of enabling shipments to be made both to points beyond and within the State of Pennsylvania it owned, maintained and operated a large number of coal cars which were used by it for both intrastate and interstate shipments, no segregation or apportionment of these cars being made as between the two classes of shipments."

"3. During the period of the action and prior thereto it had in force certain regulations providing for the distribution of its coal cars among shippers desirous of using the same, and in making this distribution it in no wise undertook to limit the use of the cars so delivered to any shipper to either intrastate or interstate shipments, but accepted and transported the cars when loaded to the destinations designated or prescribed by the shippers loading them without regard to the consideration whether those destinations were points beyond or within the State of Pennsylvania."

33 Paragraphs one, four and five, allege the existence of the defendant corporation as one organized under the laws of the State of Pennsylvania, operating in said State and other States, subject to the provisions of the Act of Congress approved February 4th, 1887, entitled "An Act to regulate commerce." That by the provisions of said act and its supplements, prohibiting unlawful and unjust discrimination of equipment by railroad companies, said Defendant Company is subject to control by the Federal Courts exclusively, and that owing to said exclusive Federal control this court is without jurisdiction in the cause of action sued on.

This proceeding is somewhat new to Pennsylvania practice. If treated from a technical standpoint, the Rule could readily be discharged for several reasons. Both as a plea in abatement and as a demurrer it comes too late, as will be seen by the above recital of the record. Under our Rule of Court a plea in bar has been entered and under all the authorities after such entry a plea in abatement is too late. Good Intent Stage Co. vs. Hartsell, 122 Pa. St. 277. Daley vs. Iselin, 212 Pa. St. 279. The plea to the general issue was

regularly entered by the Prothonotary under our Rules of Court after a rule served on the defendant to plead. It is, therefore, a regular plea in bar.

Technically also it cannot stand as a demurrer, because a demurrer admits all the facts of the declaration. A demurrer cannot raise collateral matter and set up other or new facts on which it relies to oust the action. As a demurrer this petition would be what is called a speaking demurrer, in that it sets up facts outside of the matters set forth in the declaration as a ground for defeating the action. Moreover as a demurrer it comes too late because presented after a plea to the general issue has been filed. Allwein v. Brown, 29 Superior Court 331. Therefore, either as a plea in abatement or as a demurrer, or treated as a combination of both, the Rule in this case should be discharged as coming too late.

The question raised in the petition, however, is in effect a plea to the jurisdiction. It alleges exclusive jurisdiction of the subject matter of the suit in the Federal Courts or before the Interstate Commerce Commission under the Federal Act regulating that subject. Objection to the judicial power of a court of course may be taken advantage of at any stage of the case, even on appeal. Want of jurisdiction of the subject matter is an inherent and incurable defect which cannot be waived by any acquiescence of the parties and can be raised at any stage of the proceedings in which such want of jurisdiction properly appears, either in the pleadings or in the evidence offered in course of trial. As a plea, however, it is said to have no place in our jurisdiction. Troubat and Haly's Practice, Vol. 1, 5th Edition, page 282, section 513. Is then the question of jurisdiction raised by this petition and the rule granted thereon properly before the court at this time? We prefer to treat it in this way rather than technically as a plea in abatement or as a demurrer. In our view, while as a plea in abatement or as a
34 demurrer it comes too late, as a plea to the jurisdiction it comes too early. In effect it assumes facts which are not now before the Court. Paragraph- two and three of the petition allege a certain state of facts which do not appear in any of the pleadings and would be the subject of proof. These facts are substantive as a defense in behalf of the defendant and as such must be proved as facts. The question raised, therefore, by this petition is one which can doubtless be interjected as a defense either at the close of the plaintiff's case, if the facts therein are brought out on cross-examination, or at the close of the defendant's case as a matter of distinct proof of such defense. If, as a question of law, the Interstate Commerce Act of Congress, approved February 4th, 1887, entitled "An Act to regulate Commerce," confers sole and exclusive jurisdiction on the Federal Courts and upon the Interstate Commerce Commission as to acts of discrimination in the distribution of railroad equipment to shippers, that is a legal proposition which can only be passed on by the court when it is shown that the Defendant railroad is engaged "inter alia, in transporting interstate commerce coal" as well as in transporting coal wholly within the

State for the plaintiff or other owners and operators, as alleged in paragraph two of the petition. Paragraph three of the petition also alleges the existence of certain regulations "for the distribution of its coal cars among shippers desirous of using the same" and that such distribution was without regard to whether such shipper wanted it for intrastate or interstate shipments. Such allegations are clearly matters of fact subject to proof and cannot be taken for granted on mere petition and answer. The question of jurisdiction, therefore, raised by this proceeding is prematurely raised.

The Plaintiff's Statement does not allege or aver anything with respect to interstate commerce or that any of its coal trade is without the State. It does not claim and cannot of course claim under the authority of cases already tried in this Court and approved by the Appellate Courts for any coal shipped by the plaintiff to points without the State. As a plea or proceeding, whatever it may be named, for raising the question of jurisdiction we regard it as premature and the Rule should be discharged for that reason alone.

We prefer not to enter at length upon the merits of the controversy as to jurisdiction at this time. The right of a plaintiff to recover under the Pennsylvania discriminatory acts has been clearly recognized by the Appellate Courts of Pennsylvania. In Wright v. Baltimore & Ohio R. R. Co., 32 Superior Court 5, as appears in the charge of President Judge Kooster, the question of jurisdiction and of the right of a plaintiff to recover for shipments wholly within the State of Pennsylvania was squarely raised and the judgment of the lower Court affirmed by the Appellate Court. In a case from this County, Hillsdale Coal & Coke Company v. Pennsylvania Railroad Company, 229 Pa. St. 61, one of the principal defences, at least indirectly, raised the question of jurisdiction. The position taken by the trial judge, permitting a recovery for a percentage of the business of the plaintiff Company shown to have been within the State
35–54 of Pennsylvania was affirmed by the Supreme Court and the language of Mr. Justice Potter, on page 67, would indicate that the question of jurisdiction was clearly in mind in affirming the position taken by the lower Court. The language there used, when he says, "the Interstate Commerce Commission would have no jurisdiction over a claim for damages sustained in connection with commerce wholly within the State, and therefore the suit pending before that body could not affect the plaintiff's right to recover for the damages here claimed," would clearly indicate the mind of our highest Appellate Court that there is a dual right to recover for the two classes of business, namely, intrastate and interstate. The Pennsylvania Constitution, as well as certain statutes based thereon, have provided for the punishment of certain undue and unreasonable discriminatory acts, either by civil or penal action. These acts of our own state would be wholly useless and nugatory, if the position taken by the learned Counsel for Defendant were correct. No railroad Company in Pennsylvania, however short its line or meager its equipment, could fail to show that some of the car equipment which it operates at some stage of its life had been used in interstate business. This simple fact alone, if the position of Defendants'

Counsel is sustained, would defeat the right of a plaintiff to use the State Courts for a recovery against any railroad company within the State for an undue and unreasonable distribution of cars. Carried out to its logical conclusion, therefore, the argument of counsel proves too much.

Without laboring the merits of the question, however, further at this time, we are of opinion that the Rule should be discharged as prematurely raising the question of jurisdiction.

Decree.

Now July 19th, 1911, Rule discharged at the cost of the Defendant. Exception noted & bill sealed.

By the Court.

ALLISON O. SMITH, *P. J.*

Endorsement: No. 221 May Term 1909. Puritan Coal Mining Company vs. The Pennsylvania Railroad Co.—Opinion. Filed Jul- 20, 1911. Roll B. Thompson, Prothonotary.

* * * * * * *

55–343 THE PURITAN COAL MINING CO.
v.
THE PENNA. R. R. CO.

Agreement to Waive Jury Trial.

And now Oct. 17" 1911 the Pl'ff and defendant in this case agree to waive trial by Jury and to submit the case to the Hon. Allison O. Smith, Pres't Judge without a jury to find the law and the facts under the provisions of the Act of Apr. 22, 1874. All rights to be preserved to each party that could accrue to either if the case were tried before a jury, with the request to present the same to the court at the proper time.

This is not intended to waive the question of jurisdiction heretofore raised by the Def't.

A. M. LIVERIGHT,
A. L. COLE,
JOHN SCOTT, JR.,
Att'ys for Pl'ff.
FRANCIS I. GOWAN,
MURRAY & O'LAUGHLIN,
Att'ys for Def't.

Endorsement: 221 May T. 1908—Filed Oct. 17 1911—Roll B. Thompson, Prothonotary.

* * * * * * *

344 (COPY OF DEFENDANT'S EXHIBIT No. 9C.)

"In the Circuit Court of the United States, Third Circuit, Eastern District of Pennsylvania, April Term, 1908.

No. 130.

PURITAN COAL MINING COMPANY
versus
PENNSYLVANIA RAILROAD.

Plaintiff's Statement.

(Filed November 23, 1908.)

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, viz:

First. That the Puritan Coal Mining Company is a corporation organized and existing under the laws of Pennsylvania, and from the 1st day of April, A. D. 1902, to the 1st day of Jan'y A. D. 1905, was the owner of a leasehold upon a large body of bituminous coal, situate in the County of Cambria, State of Pennsylvania, and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom, to points and places without and beyond the territorial limits of Pennsylvania, and was engaged in interstate commerce.

Second. That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania, by an Act of Assembly approved the 13th day of March, 1846, and is by virtue of the laws and constitution of the said state, a common carrier engaged in the transportation of passengers and property, under a common control, management or arrangement for a continuous carriage or shipment from points and places within the State of Pennsylvania, to
345 points and places without the said State, and is and was a carrier of interstate commerce, and was and is engaged in carrying, hauling and transporting bituminous coal from points and places along its main line and branches within said State, to points and places without said State.

Third. That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company are situated along or near the line or branch line of the defendant company in the County of Cambria, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff during the period from the 1st day of April, A. D. 1902, to the first day of Jan'y, A. D. 1905, was shipped over said main line and branch line of the defendant company by continuous carriage or shipment, and under the control and management of the defendant company, to points and places without and beyond the State of Pennsylvania.

Fourth. That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine and published the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its product, and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines.

Fifth. That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its
346 rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant had for daily distribution; but the defendant company disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably as well as unlawfully and unjustly neglect and refuse to furnish the plaintiff with its prorata share of the coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice, in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars, distribute and give to said favorite company five hundred (500) cars before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received, except for the said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company.

Sixth. That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, one thousand (1000) steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate markets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale deprive the plaintiff from receiving its pro rata percentage of said one thousand cars for use in hauling and transporting the product of its mines to points and places beyond the State of Pennsylvania.

347 Seventh. That during all of said period of time, to wit, from the 1st day of April A. D. 1902, to the 1st day of Jan'y, A. D. 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had during all of said period of time constant demand and orders for its

coal, in excess of the supply of coal cars furnished by the defendant company for transportation of the same to its customers, and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 277,882 tons, which it would have sold in the interstate markets and to its customers therein at prices F. O. B. cars above costs of producing same, aggregating the sum of $242,999.65 Dollars but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That because of said undue and unreasonable discriminatory acts, the plaintiff suffered damage and loss in its business of mining and selling its product in the interstate markets of the soft coal trade and in points and places and to consumers of soft coal beyond the lines of the State of Pennsylvania, and it, therefore, brings this action to recover compensation for said loss and damage in the sum of $242,999.65-100 Dollars.

DAVID L. KREBS,
Att'y for Pl'ff.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America, for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true, complete and faithful copy of the Plaintiff's Statement, filed November 23, 1908, in the case of Puritan Coal Mining Company vs. Pennsyl-
348 vania Railroad Company, 130 April Sessions, 1908, on file and now remaining among the records of the said Court in my office.

In Testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 17th day of October, in the year of our Lord, one thousand nine hundred and eleven, and of the independence of the United States, the one hundred and thirty-sixth.

[SEAL.]

HENRY B. ROBB,
Clerk of Circuit Court.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, William M. Lanning, Judge of the Circuit Court of the United States for the Third Judic-al Circuit, do hereby certify that the above named Henry B. Robb, by whom the foregoing attestation was made, was at the time of so making and is now the Clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, duly commissioned and qualified to all whose acts as such full faith and credit are and ought to be given as well in Courts of Judicature as elsewhere, and that the seal thereto annexed is the seal of the said Court and that the said attestation so made by him is in due form.

In testimony whereof, I have hereunto set my hand this 18th day of October, A. D. one thousand nine hundred and eleven.

W. M. LANNING,
Circuit Judge.

19 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Set:

I, Henry B. Robb, Clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, do certify that the Honorable William M. Lanning, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof and still is Judge of the Circuit Court of the United States for the Third Judic-al Circuit, duly commissioned and sworn, to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court, this nineteenth day of October in the year of our Lord, one thousand nine hundred and eleven, and the one hundred and thirty-sixth year of the Independence of the United States.

[SEAL.] HENRY B. ROBB, *Clerk.*

(COPY OF PLAINTIFF'S EXHIBIT No. 27.)

	Tonnage billed for consignee to Pennsylvania points.	Tonnage bill for consignee to points outside Pennsylvania.
1902.		
April	1071	16753
May	2429	18115
June	2862	14638
July	2384	15783
350 Aug.	2500	15711
Sept.	2067	17392
Oct.	2776	15111
Nov.	1885	13353
Dec.	2585	11699
1903.		
Jany.	2982	10769
Feby.	1239	11045
March	2506	16800
April	1851	17197
May	3272	12200
June	3504	15097
July	2841	14609
Aug.	1838	14297
Sept.	3967	11115
Oct.	1918	13838
Nov.	2159	13663
Dec.	2625	12733

1904.		
Jany.	3132	7173
Feby.	3127	8862
March	3966	10480
April	4140	8397
May	1806	8505
June	3299	7260
351–396 July	2634	5486
Aug.	3452	9242
Sept.	3257	10435
Oct.	3232	8717
Nov.	2687	13428
Dec.	2609	7510

* * * * * * *

397 May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Trial Without Jury under Act of April 22, 1874.

Findings of Fact, Law, Opinion and Verdict.

Filed Dec. 29, 1911. Roll B. Thompson, Prothonotary.

398 VII. Report of Facts and Law by the Judge Sitting without a Jury.

This case was commenced March 26th, 1908, and plaintiff's statement filed November 21st of that year. On April 13th, 1911, after leave granted by the court, an amended statement was filed and later plea entered, issue joined and on the trial list at a special October Term. October 16th, when the case was called for trial, the parties, by agreement filed, submitted the case to the decision of the Court without a jury, under the Act of 22d April, 1874, P. L., 109. The taking of testimony lasted until Thursday, October 19th, and was argued by counsel, without submission in full of their requests for findings of law and fact, on Friday, the 20th. The stenographer was then directed to transcribe the testimony for use of counsel and the court, and counsel for plaintiff and defendant, respectively, were given until Saturday, November 11th, to file with the court their full requests for findings of fact and law, and for the filing of their respective briefs covering the case. Said respective briefs and requests were accordingly filed on or about said date, November 11th, from which time the termination of the trial dates.

From the evidence submitted the following facts material to the issue are found by the court:—

First. That the plaintiff company is a corporation, duly organized under the laws of the State of Pennsylvania, for the purpose of engaging in mining and shipping bituminous coal, and was so engaged during the period of the action, namely, from April 1st, 1902, to December 31st, 1904, inclusive. That the plaintiff operated three mines, named respectively Puritan Nos. 1, 3 and 5; all of which were located on Martin's Branch, in Cambria County, tributary to the main line of the Pennsylvania Railroad, in what is known by said railroad as their Mountain or, Pittsburg East End Division.

399 Second. That the Pennsylvania Railroad Company is a common carrier, by virtue of its charter and the laws of Pennsylvania creating said company and subject to the laws of the said State of Pennsylvania governing common carriers.

Third. That tributary to the said main line of the Pennsylvania Railroad, west of said Martin's Branch, another branch of said main line of the Pennsylvania Railroad, called the South Fork and Scalp Level Division, branches from said main line and extends into Somerset County to what is known as the Berwind-White Scalp Level mining territory; upon which said division eleven mines of the Berwind-White Coal Mining Company, known as Eureka Nos. 30 to 39, inclusive, and the Yellow Run Mine, are located. That all of the mines on the said two divisions, known as the Mountain Division and the South Fork and Scalp Division, are located substantially in the same vicinity, are given the same freight rate to market, and are of the same general character and produce substantially the same quality of coal. Also all of said mines, on said two divisions, are wholly dependent upon the Pennsylvania Railroad for marketing their coal and the coal loaded by all of said mines is under and subject to substantially the same terms and conditions, and requires from the railroad company service of like nature and character.

Fourth. That for the purpose of approximating equality of distribution of cars to the various mines along its line the defendant company, as well as the various operators, recognized a system of rating the mines according to their capacity to produce coal, which ratings appear on the daily distribution sheets of the said railroad company for the various divisions. These daily distribution sheets for the Mountain Division, as also for the South Fork and Scalp Level Division, were offered in evidence. From the Mountain

400 Division distribution sheets the ratings of the Puritan mines of the plaintiff company appear as set out in Plaintiff's Requests for Findings of Fact No. 6, which we do not now deem it necessary to here repeat. From the sheets of the South Fork and Scalp Level Divisions appears the ratings of the various mines of the Berwind-White Coal Mining Company, located on said division, as appears in the Plaintiff's Request for Findings of Fact No. 7, which it is not here necessary to repeat.

Fifth. That beginning in the Summer of 1902 the defendant company, by virtue of telegraphic orders issued from the general officers in charge of the operation of the defendant company and carried out by the officers and train crews of the said company, gave

to Berwind-White Coal Mining Company a preference in the distribution of cars on the defendant company's line, for use in the coal trade, over the mines of the Mountain Division, and this preference, both directly and indirectly, affected the distribution of cars to the plaintiff company. These telegraphic orders for preference, as shown by the testimony, begin June 28th, 1902, from Superintendent Wallis, of said company, located at Altoona, to subordinate officers, and direct that a preference up to 500 cars daily shall be given out of all cars to the mines of the Berwind-White Coal Mining Company at Scalp Level receive equal to 500 cars daily, counting steel cars kept standing over each night so that the mines at Scalp Level shall be served early in the morning. That this preference in distribution affected the ratio of cars distributed to the plaintiff company as a part of the Mountain Division appears in various telegrams, as follows: In that of J. M. Wallis to R. L. O'Donnell, under date of October 16th, 1902, as follows: "Commencing at once please arrange to see that the mines of the Berwind-White Coal Mining Company at Scalp Level receive equal to 500 cars daily, counting steel cars as two, before placing at any other operation in the Scalp Level region or on the Mountain." In telegram of October 21st,
401 1902, from Wallis to O'Donnell, "In addition to having 500 cars at Scalp, in order to protect it I will be glad if you will make a special effort to have from 150 to 200 cars standing over there each night, even if you do not place cars on the Mountain for coal. The mines of the Berwind-White Coal Mining Company must be supplied with equal to 500 cars each day in order that there may be no difficulty as result of accident or the cars being late. We are not prepared to take any chances on getting the cars to Scalp, and in addition to having 500 at their mines in time for loading daily, in order to protect ourselves we should have an extra 150 or 200 standing over each evening to start them in the morning. Please so arrange." Another telegram of the same date, from Wallis to O'Donnell, reads as follows: "We are not meeting with the success necessary to get 500 cars to Scalp daily. Will you please refer to my telegram last week requesting that equal to 500 cars daily be placed at the mines of the Berwind-White Coal Mining Company at Scalp, in addition to the cars placed at Yellow Run mine, in preference to placing cars at any other operation on the Mountain or in the South Fork district and see that the instructions are carried out. Special efforts should be made to get the cars to the mines in ample time for loading each day. The Berwind-White Coal Mining Company have not been able to coal the mail steamers in New York Harbor last week and this week. Most positive instructions should be issued and the arrangements carried out that equal to 500 cars will be at the mines of the Berwind-White Coal Mining Company, Scalp Level region, each and every day before any attempt is made to supply cars to the mines on the Mountain, South Fork District or South Fork Railroad. Please advise if understood." And under date of November 22d, 1902, from J. M. Wallis to R. Pitcairn, Pittsburg: "Please give Berwinds mines at Scalp all the cars you have in the territory for to-morrow, cutting the other operations."

That this preference continued and that it was a preference
402 which affected particularly the mines on the Mountain Division appears later in a telegram from G. W. Creighton, then superintendent at Altoona, to S. C. Long, superintendent at Pittsburg, in the following language: "Our efforts this week in keeping Scalp supplied with cars have not been at all successful. Please renew the instructions to all parties interested that before placing cars for other operations on the Mountain or on the South Fork Railroad, equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day until further notice and it is important that sufficient cars should be placed early each morning so that all of the mines will have a supply to start with and there will be no danger of any operations being idle on account of not having cars. To protect ourselves on this arrangement I would be glad if you will arrange to accumulate and have standing over daily equal to 175 to 225 cars in addition to the 500 that are required for loading. This is absolutely necessary in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the East carried out. The only exception that should be made to this order is for the Dunlo drift mine to have sufficient cars daily to protect the N. Y. P. & N. supply coal order, which I think is 200 tons per day. Acknowledge receipt." Said special orders were not rescinded during the period of action.

Sixth. That (owing to the anthracite strike) beginning in the spring of 1902 and continuing the balance of said year 1902 and throughout the year 1903, the bituminous coal trade of Pennsylvania along the lines of the Pennsylvania Railroad was unusually active and for that reason there was an unusual demand for cars from the defendant company by the coal operators along its lines, and that the defendant company did not have a sufficient car equipment to supply the existing demand. The defendant com-
403 pany, however, in face of this shortage in car supply, did, in the month of July, 1902, sell of its car equipment then on hand and on its lines in operation in the coal trade 727 stel coal cars to the Berwind-White Coal Mining Company, and agreed to sell and deliver in addition thereto 273 additional cars of like character out of an equipment of 1,000 cars then ordered or to be ordered and in course of construction, making in all 1,000 cars; and all of which said 1,000 cars were practically delivered by the said defendant company to the said Berwind-White Coal Mining Company during the said year 1902 and a few early in the spring of 1903.

Seventh. That as a result of the preferences given to the said Berwind-White Coal Mining Company, in the Scalp Level region on the South Fork and Scalp Level Division of the said defendant company's railway, the mines of the plaintiff company, situate on the Mountain Division of said railway, were seriously hampered in their mining operations, in that they did not receive their full quota of cars according to their distributive rating, were many days without cars and cars when distributed were not distributed at such a time as that they could be loaded for that day, whereby also their miners became scattered and disaffected and their cost of mining was largely

increased. The effect of the preference given to the mines of the Berwind-White Coal Mining Company, as shown in the figures offered in evidence and as embodied in some of the Requests for Findings of Fact submitted by plaintiff's attorneys, in percentages, is indicated by the fact that Berwind-White received 67.02 per cent. of their car capacity while the Puritan mines received only 40.79 per cent. of their car capacity. The Puritan mines also controlled, by virtue of the Baker Whitely cars, a larger per cent of individual cars than did the Berwind-White Coal Mining Company, so that exclusive of individual cars it is shown by these tables, worked out mathematically, that Berwind-White received 50.51 per cent.
404 of their capacity in Pennsylvania Railroad system cars, while the Puritan mines received but 22.76 per cent. of their capacity in cars of the defendant company. That the plaintiff company was seriously affected in its output is also shown in the figures submitted by its attorney, John Scott, Jr., to S. M. Prevost, Third Vice-President of the Pennsylvania Railroad, under date of March 3d, in which he says, "In January, 1902, we shipped 17,600 tons and in January, 1903, we have been able to ship only 11,850 tons. Our capacity at these mines is from twelve to fourteen hundred tons per day and the restriction upon our output in 1902 was then due to inadequate car supply." That these various acts of the defendant company are found as a fact to be discriminatory and to entitle the plaintiff to recover damages on some basis.

Eighth. That the mines of the plaintiff company were well equipped and could have produced up to their rated capacities, and that the plaintiff company was in a position, considering the state of the market, to have sold substantially the capacity of its mines during the period covered by this action. That of the coal which it did sell from 73 to 96 per cent. thereof was sold f. o. b. cars at the mines, and that the testimony in the case would indicate that the coal, which it could and would have sold, had it been furnished with its proper pro rata supply of cars, would have been sold on like terms, conditions and proportions f. o. b. cars or within the State of Pennsylvania.

Ninth. That the distribution sheets of the Mountain Division of the Pennsylvania Railroad, on which the plaintiff company's mines were situated and of which said mines constituted a part, show that the percentage of cars allowed to the Puritan mines by the defendant company, according to said sheets, is as follows:

405 *"Percentage of Cars Allotted to Puritan Mines by Defendant.*

	P ✱1.		P ✱3.		P ✱5.	
1902	1 to 9.	10 to 30.	1 to 9.	10 to 30.		
April	5.5	5.2	3.0	2.9	...	8.2
May	5.2	.....	2.9	.....	...	8.1
June	5.2	.....	2.9	.....	...	8.1
July	5.2	.....	2.9	.....	...	8.1
Aug.	5.2	.....	2.9	.....	...	8.1
Sept.	5.0	.....	2.8	.....	...	7.8
Oct.	5.0	.....	2.8	.....	...	7.8
Nov.	4.9	.....	2.7	.....	...	7.6
Dec.	4.9	.....	2.7	.....	1.9	9.5
1903.						
Jan'y	5.0	.....	2.8	.....	1.9	9.7
Feb'y	5.0	.....	2.7	.....	1.9	9.6
March	4.9	.....	2.7	.....	1.9	9.5
April	5.0	.....	2.8	.....	1.9	9.7
May	4.5	.....	2.5	.....	1.5	8.5
June	4.5	.....	2.5	.....	1.5	8.5
July	4.5	.....	2.5	.....	1.5	8.5
Aug.	4.5	.....	2.5	.....	1.5	8.5
Sept.	4.5	.....	...	.....	1.5	6.0
Oct.	4.2	.....	...	.....	1.5	5.7
Nov.	4.5	.....	...	.....	1.5	6.0
Dec.	4.5	.....	...	.....	1.5	6.0
1904.						
Jan'y	4.5	.....	...	.....	1.5	6.0
Feb'y	4.5	.....	...	.....	1.5	6.0
March	4.5	.....	...	.....	1.5	6.0
April	4.5	.....	...	.....	1.5	6.0
May	4.5	.....	...	.....	1.4	5.9
June	4.5	.....	...	.....	1.4	5.9
July	4.2	.....	...	.....	1.4	5.6
Aug.	4.2	.....	...	.....	1.4	5.6
Sept.	4.2	.....	...	.....	1.4	5.6
Oct.	4.2	.....	...	.....	1.4	5.6
Nov.	4.2	.....	...	.....	1.4	5.6
Dec.	4.2	.....	...	.....	1.4	5.6

Tenth. That the distribution sheets of both the Mountain Division and of the South Fork and Scalp Level Division were offered
406 in evidence for all purposes, although on account of their great bulk the whole of said sheets are not transcribed in the record. From said sheets, by direction of the court, the following data as to the total distribution of steel cars to the said two divisions were made and are as follows:

Total Distribution of Steel Cars.

1st Column, Altoona to Conemaugh (Mountain Div.).
2nd " South Fork & Scalp Level Division.

1902.		
April	1032	5181
May	1147	5702
June	1232	5192
July	1251	5124
Aug.	1541	4781
Sept.	1294	4281
Oct.	1226	3933
Nov.	1140	3794
Dec.	798	3181
1903.		
Jan'y	790	2994
Feb'y	963	3373
March	1970	3872
April	1388	3340
May	1004	3015
June	1338	3044
July	1364	3021
Aug.	1589	3126
Sept.	1358	2983
Oct.	858	2708
Nov.	1013	3076
Dec.	1049	3313
1904.		
Jan'y	757	3169
Feb'y	1187	2904
March	1088	3387
April	1007	4279
May	1269	3931
June	937	3196
July	776	3313
Aug.	801	2416
Sept.	746	2152
Oct.	668	3064
Nov.	649	2505
Dec.	479	2150
	35709	115500

407 Eleventh. From the same distribution sheets, by direction of the court, there is obtained the following, showing the total distribution of all cars during the period of the action, as follows:

Column. Total Distribution, Pittsburgh Division Altoona to Conemaugh, Car for Car Except South Fork & Scalp Level.

d Column. Like Distribution, South Fork & Scalp Level Division.

1902.					
ril	7118				7403
y	7576	Total Mt. Division			8165
ne	7549	Counting Steel as			8105
ly	8005	Two	223951	Cars	7602
g.	7350				7955
ot.	7122	Total South Fork &			8034
r.	6275	Scalp Level, same			8016
v.	5725	basis	356596	"	6781
c.	5245				6084
			580547	"	
1903.					
n'y	4522				5360
b'y	4074				6221
rch	7056				7702
ril	5332				7809
ay	5765				7139
ne	6043				7485
ly	5699				7009
g.	5682				7405
ot.	5705				7174
t.	5822				7123
v.	5503				7087
c.	5941				7385
1904.					
n'y	4349				6034
b'y	5338				5918
rch	6176				7282
ril	5136				7614
ay	4833				8143
ne	4400				7603
ly	4715				7037
g.	5074				7742
pt.	4688				7928
t.	5423				8147
v.	4714				8098
c.	4485				6503
	188242				241093
Add	35709	for steel as two.	Add for steel as two		115503
	223951				356596

408 Twelfth. From the same distribution sheets, in order to work out equitably the verdict which the court deems a proper one in this case, it was necessary to make a division of the kind and character of the cars distributed to the said two regions, which appear as follows:

	Pittsburgh Division East of Conemaugh (Mountain Division).				South Fork & Scalp Level Division.			
1902.	Steel.	Ind.	All Others.	Total.	Steel.	Ind.	All Others.	Total.
April	1032	2331	3755	7118	5181	881	1341	7403
May	1147	2600	3829	7576	5702	802	1661	8165
June	1232	2252	4062	7549	5192	927	1986	8105
July	1251	2135	4619	8005	5124	949	1529	7602
Aug.	1541	2021	3788	7350	4781	792	2382	7955
Sept.	1294	2102	3726	7122	4281	1281	2472	8034
Oct.	1226	1915	3134	6275	3933	1807	2276	8016
Nov.	1140	1927	2658	5725	3794	1528	1459	6781
Dec.	798	1723	2724	5245	3181	1464	1439	6084
1903.								
Jan'y	790	1273	2459	4522	2994	835	1531	5360
Feb'y	963	1434	1677	4074	3373	1353	1495	6221
March	1970	2035	3051	7056	3872	2206	1624	7702
April	1388	1856	2088	5332	3340	2506	1963	7809
May	1004	1937	2824	5765	3015	2769	1355	7139
June	1338	2021	2684	6043	3044	3258	1183	7485
July	1364	1856	2479	5699	3021	3041	947	7009
Aug.	1589	2218	1875	5682	3126	3654	625	7405
Sept.	1358	2148	2001	5507	2983	3571	620	7174
Oct.	858	2537	2427	5822	2708	3711	704	7123
	1013	2274	2116	5503	3076	3247	764	7087

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Dec.	1049	2079	2813	5941	3313	2746	1326	7385

1904.								
Jan'y	757	1537	2055	4349	3169	2230	635	6034
Feb'y	1187	1943	2208	5338	2904	2620	394	5918
March	1088	2053	3035	6176	3387	2905	990	7282
April	1007	1980	2149	5136	4279	2411	924	7614
May	1269	1793	1771	4833	3931	2685	1527	8143
June	937	1863	1600	4400	3196	3573	834	7603
July	776	2037	1902	4715	3313	2924	800	7037
Aug.	801	2195	2078	5074	2416	3709	1717	7742
Sept.	746	1928	2014	4688	2152	3988	1788	7928
Oct.	668	2547	2208	5423	3064	3749	1334	8147
Nov.	649	2214	1851	4714	2505	4147	1446	8098
Dec.	479	2528	1478	4485	2150	2762	1591	6503
Total	35709	67395	85138	188242	155500	81031	44562	241093
				35709				115503
Counting steel at two				223951				356596

409 Thirteenth. That the evidence shows that the fair average cost of producing coal at the plaintiff's mines during the period of the action, including royalty, had they been treated by the defendant company with a fair distribution of cars, was one dollar and ten cents per ton from April, 1902, to March, 1903, inclusive, and one dollar and fifteen cents per ton from April, 1903, to March, 1904, inclusive, and one dollar and twelve cents per ton for the period of the action thereafter.

Fourteenth. That during the period of the action a considerable portion of the output of plaintiff's mines was contracted by yearly contracts with Baker, Whitely & Co., at a fixed price per ton, which price during the year 1902 and 1903, at least for a portion of the time, was lower in price than the average market price for coal in the region, and during a part of the year 1904 was higher in price than the average market price for the region. Also during that portion of the period from April, 1902, until July 1st, 1903, the output of plaintiff's No. 3 mines was affected by the price of the coal to be furnished to the Lovell Coal Company, as per written contract made in the purchase of said mine from the Lovell Coal Company. That the contract with the Lovell Coal Company was made in 1898, at which time the price of mining was forty cents per ton and the price named of the coal to be furnished by the Puritan Company to the Lovell Company was seventy cents a ton. When the price of mining was raised to sixty-two or sixty-six cents per ton, the price to the Lovell Coal Company was increased accordingly. The average prices as given by George E. Scott, C. H. Jacobs and W. J. Faux appear in the first three columns below, and the average price as affected by the outstanding contracts of the plaintiff company with Baker, Whitely & Co. and with the Lovell Coal Company, which average price is hereby adopted by the court as the basis for estimating damages in this suit, appear in column 4 of this table.

410

1902.	Scott.	Jacobs.	Faux.	Price adopted by court.
April	1.24	1.25	1.00	1.17
May	1.45	1.65	1.00	1.30
June	2.40	2.50	2.50	1.86
July	2.19	1.55	2.00	1.72
Aug.	1.73	2.00	2.50	1.47
Sept.	2.07	2.15	2.25	1.69
Oct.	3.73	3.00	3.75	2.54
Nov.	3.25	3.25	3.50	2.28
Dec.	4.24	3.00	5.00	2.80
1903.				
Jan.	4.72	5.00	5.00	3.22
Feb.	2.69	2.50	3.00	2.09
March	1.81	2.25	1.75	1.59
April	1.63	2.60	1.90	1.57
May	1.53	1.50	1.92	1.52

	Steel Cars required to make equal with Scalp Level.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalize with Scalp Level.	Long in Other Cars.
1902					
April	3106.5	2074.5	4149	2548	1207
May	3424.5	2277.5	4555	2745	1084
June	3212	1980	3960	3024	1038
July	3187.5	1936.5	3873	3074	1545
Aug	3161	1620	3240	3085	703
Sept	2787.5	1493.5	2987	3099	627
Oct	2579.5	1353.5	2707	2705	429
Nov	2467	1327	2654	2058.5	599.5
Dec	1989.5	1191.5	2383	2081.5	642.5
1903					
Jan	1892	1102	2204	1995	464
Feb	2168	1205	2410	1586	91
Mar	2921	951	1902	2337.5	713.5
Apr	2364	976	1952	2025.5	62.5
May	2009.5	1005.5	2011	2089.5	734.5
June	2191	853	1706	1933.5	750.5
July	2192.5	828.5	1657	1713	766
Aug	2357.5	768.5	1537	1250	625
Sept	2170.5	812.5	1625	1310.5	690.5
Oct	1783	925	1850	1565.5	861.5
Nov	2044.5	1031.5	2063	1440	676
Dec	2181	1132	2264	2069.5	743 5
1904					
Jan	1963	1206	2412	1345	710
Feb	2045.5	858.5	1717	1301	907
Mar	2237.5	1149.5	2299	2012.5	1022.5
Apr	2643	1636	3272	1536.5	612.5
May	2600	1331	2662	1649	122
June	2056.5	1129.5	2259	1217	383
July	2044.5	1268.5	2537	1351	851
Aug	1608.5	807.5	1615	1847.5	230.5
Sept	1449	703	1406	1901	115
Oct	1866	1198	2396	1771	437
Nov	1577	828	1856	1648.5	202.5
Dec	1314.5	835.5	1671	1534.5	X(56.5)
	75604.5	39895.5	79791	64850	20344.5

X Is short.

Steel Cars required to make equal with Scalp Level.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalize with Scalp Level.	Long in Other Cars.	Net Shortage in cars (Steel as two).	Net Shortage in tons (Car 25 tons).	Puritan Distribution percentage for month as fixed by Defs.	Shortage in Puritan tonnage on acct. of car shortage.	Average selling price per ton.	Cost of production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss Penna. Delivery.	Total Loss Interstate Delivery.
3106.5	2074.5	4149	2548	1207	2942	73550	8.2	6031.1	1.17	1.10	.07	422.18	78.23	21.77	330.27	91.91
3424.5	2277.5	4555	2745	1084	3471	86775	8.1	7028.7	1.30	1.10	.20	1405.74	75.21	24.79	1057.26	348.48
3212	1980	3960	3024	1038	2922	73050	8.1	5917.4	1.86	1.10	.76	4497.22	80.25	19.75	3609.02	888.20
3187.5	1936.5	3873	3074	1545	2328	58200	8.1	4714.2	1.72	1.10	.62	3062.80	85.14	14.86	2607.67	455.13
3161	1620	3240	3085	703	2537	63425	8.1	5137.4	1.47	1.10	.37	1900.84	88.86	11.14	1689.09	211.75
2787.5	1493.5	2987	3099	627	2360	59000	7.8	4602	1.69	1.10	.59	2715.18	81.88	18.12	2223.19	491.99
2579.5	1353.5	2707	2705	429	2278	56950	7.8	4442.1	2.54	1.10	1.44	6396.62	86.79	13.21	5551.63	844.99
2467	1327	2654	2058.5	599.5	2054.5	51362.5	7.6	3903.5	2.28	1.10	1.18	4606.13	86.93	13.07	4004.11	602.02
1989.5	1191.5	2383	2081.5	642.5	1740.5	43512.5	9.5	4133.6	2.80	1.10	1.70	7027.12	91.05	8.95	6398.19	628.93
1892	1102	2204	1995	464	1740	43500	9.7	4219.5	3.22	1.10	2.12	8945.34	92.27	7.73	8253.96	691.38
2168	1205	2410	1586	91	2319	57975	9.6	5565.6	2.09	1.10	.99	5509.94	88.46	11.54	4874.09	635.85
2921	951	1902	2337.5	713.5	1188.5	29712.5	9.5	2822.6	1.59	1.10	.49	1383.07	87.95	12.05	1216.41	166.66
2364	976	1952	2025.5	62.5	1889.5	47237.5	9.7	4582	1.57	1.15	.42	1924.44	91.98	8.11	1768.37	156.07
2009.5	1005.5	2011	2089.5	734.5	1276.5	31912.5	8.5	2712.5	1.52	1.15	.37	1003.63	94.97	5.13	952.14	51.49
2191	853	1706	1933.5	750.5	955.5	23887.5	8.5	2030.4	1.53	1.15	.38	771.55	90.64	9.36	699.33	72.22
2192.5	828.5	1657	1713	766	891	22275	8.5	1893.3	1.55	1.15	.40	757.32	96.39	3.61	729.98	27.34
2357.5	768.5	1537	1250	625	912	22800	8.5	1938.0	1.50	1.15	.35	678.30	87.73	12.27	595.07	83.23
2170.5	812.5	1625	1310.5	690.5	934.5	23362.5	6.0	1401.7	1.50	1.15	.35	490.60	86.86	13.14	426.14	64.46
1783	925	1850	1565.5	861.5	988.5	24712.5	5.7	1408.6	1.46	1.15	.31	436.67	85.90	14.10	375.10	61.57
2044.5	1031.5	2063	1440	676	1387	34675	6.0	2080.5	1.48	1.15	.33	686.57	90.06	9.94	618.33	68.24
2181	1132	2264	2069.5	743 5	1520.5	38012.5	6.0	2280.7	1.44	1.15	.29	661.40	93.97	6.03	621.52	39.88
1963	1206	2412	1345	710	1702	42550	6.0	2553	1.43	1.15	.28	714.84	87.67	12.33	626.70	88.14
2045.5	858.5	1717	1301	907	810	20250	6.0	1215	1.41	1.15	.26	315.90	73.88	26.12	233.39	82.51
2237.5	1149.5	2299	2012.5	1022.5	1276.5	31912.5	6.0	1914.7	1.43	1.15	.28	536.12	81.15	18.85	435.05	101.06
2643	1636	3272	1536.5	612.5	2659.5	66487.5	6.0	3989.2	1.31	1.15	.16	638.27	83.94	16.06	535.76	102.51
2600	1331	2662	1649	122	2540	63500	6.9	3746.5	.....	.....	.....	.....	81.79	18.21		
2056.5	1129.5	2259	1217	383	1876	46900	6.9	2777.1	.....	.....	.....	.....	93.89	6.11		
2044.5	1268.5	2537	1351	851	1986	49650	5.6	2780.4	.....	.....	.....	.....	95.93	4.07		
1608.5	807.5	1615	1847.5	230.5	1384.5	34612.5	5.6	1938.3	.....	.....	.....	.....	88.46	11.54		
1449	703	1406	1901	115	1293	32325	5.6	1810.2	1.23	1.12	.11	199.12	80.95	19.05	161.19	37.93
1866	1198	2396	1771	437	1959	48975	5.6	2742.6	1.23	1.12	.11	301.68	90.59	9.49	273.06	28.63
1577	828	1856	1648.5	202.5	1653.5	41337.5	5.6	2314.9	1.23	1.12	.11	254.64	73.72	26.28	187.72	66.92
1314.5	835.5	1671	1534.5	X(56.5)	1727.5	43187.5	5.6	2418.5	1.23	1.12	.11	266.04	80.48	19.52	204.11	51.93
75604.5	39895.5	79791	64850	20344.5	59503.0	1487573.0	.....	109045.4	.....	.....	.....	58509.27	.....	.....	51257.85	7251.42

June	1.55	1.50	1.88	1.53
July	1.55	1.46	1.73	1.55
Aug.	1.48	1.44	1.68	1.50
Sept.	1.49	1.40	1.71	1.50
Oct.	1.42	1.37	1.70	1.46
Nov.	1.45	1.35	1.65	1.48
Dec.	1.40	1.37	1.65	1.44
1904.				
Jan.	1.35	1.35	1.58	1.43
Feb.	1.31	1.24	1.57	1.41
March	1.34	1.26	1.54	1.43
April	1.31	1.26	1.51	1.31
May	....	1.10	1.40	....
June	....	1.15	1.31	....
July	....	1.12	1.29	....
Aug.	....	1.06	1.27	....
Sept.	1.17	1.09	1.28	1.23
Oct.	1.18	1.11	1.25	1.23
Nov.	1.17	1.12	1.26	1.23
Dec.	1.17	1.17	1.30	1.23

(Here follow tables marked pages 411 and 412.)

413 Fifteenth. The general idea of the car distribution by the defendant company to the bituminous mines along its lines was a division of the mines upon and tributary to certain arbitrary divisions of the railroad company, and the distribution to those divisions was based on the total capacities of the mines in those divisions. Among these general divisions was the Mountain Division, consisting of the main line and smaller branches between Altoona and Conemaugh, and the South Fork and Scalp Level Division, leaving the main line at South Fork and running into the Scalp Level region of Somerset County. These two divisions are the only general divisions which became the subject of controversy in this action and the distribution sheets of which were offered in evidence. During the years 1902, 1903 and 1904, according to the testimony of M. Trump, general superintendent of transportation during that period, the Mountain Division and the South Fork and Scalp Level Division, as divisions for car distribution, had near the same rating (M. Trump, page 199 of the testimony, said he thought the Mountain Division was the higher). For the purposes of this case we will consider the bituminous coal car distribution rating of the said two divisions as being equal and have adopted that fact as one of the elements going to make up the basis of calculation of the measure of damages to which the plaintiff is entitled. Out of the data furnished from the distribution sheets and found as facts in the ninth, tenth, eleventh and twelfth findings (supra), together with the average prices found from which the cost of production is taken, the following schedule is believed to be the fair and reasonable deductions therefrom:

414 To explain said schedule, it will be seen that steel cars furnished to both the Mountain Division and the South Fork and Scalp Level Division are treated separately. Then that all other cars, excluding individual, are treated in like manner separately, and thereby the net shortage in cars and tons is found for the Mountain Division. As an illustration, the steel cars for April, 1902, furnished to the Mountain Division were 1032, and for the South Fork and Scalp Level Division, 5181, a total of 6213. If the Mountain Division was to be treated equally with the Scalp Level Division, it should have had one-half of said 6213, or 3106.5 steel cars (as appears in column one of schedule). As it received but 1032 steel cars it was short in steel cars 2074.5 cars, as shown in the second column. Counting steel cars as two, it would be double that named, as shown in the third column. As appears from the table shown in twelfth finding, excluding individual cars it will be seen that the Mountain Division received its excess of other cars. So that column four shows the equalization between the two divisions as to other cars, and it is found that the Mountain Division is therefore long or had an excess of other cars, as appears in column five (with one exception), and the items of column five subtracted from the items of column three show the net shortage of cars, month by month, given to the Mountain Division during the period of the action. Column seven shows that net shortage worked out in tons, each car counted as 25 tons. This then would be the total shortage

for the Mountain Division to which the plaintiff, the Puritan Coal Company, were entitled to the various percentages as shown by the total in finding nine, so that the total shortage in tons of the plaintiff company would be as shown in column nine of the schedule. Column thirteen, therefore, shows the total loss occasioned to the plaintiff company by reason of unfairness of car distribution. Column sixteen shows the total loss to the plaintiff company because of unfairness in car distribution, as shown by the percentages,
415 month by month, of the totals based upon the percentage of Pennsylvania delivery, including f. o. b. cars at the mines, which we believe to be the proper measure of damages which can be recovered in this suit, to which should be added a sum equal to interest at six per cent for seven and one-half years, as damages for delay.

Sixteenth. That plaintiff is entitled to a judgment for the said sum of $51,257.85, plus 45 per cent as compensation or damages for the delay of from seven to nine years, making in all $74,323.88.

The following requests for findings of fact were submitted:

Plaintiff's Requests for Findings of Fact.

"(1.) That the plaintiff company is a corporation under the laws of the State of Pennsylvania engaged in mining and shipping bituminous coal and was so engaged during the period of this action. That it had under lease in its possession and control a large amount of coal territory in the county of Cambria and State of Pennsylvania which it operated during the said period. That the property so in the control of the plaintiff was capable of producing during the period of this action very large quantities of coal in excess of the quantities which it claims the right to have produced and have shipped by the defendant. That the plaintiff's coal mines, three in number, are located on the Martin's Branch of the Mountain Division of the Pennsylvania Railroad about — miles from the branch of the same railroad which constitutes the South Fork and Scalp Level Divisions upon which branch are located the eleven mines of the Berwind-White Coal Mining Company, being Eureka numbers 30 to 29 (39) inclusive and the Yellow Run Mine. That said mines of both companies are located substantially in the same vicinity and demand the same freight rate to market and are mines of
416 like character and producing substantially the same quality of coal."

Affirmed.

"(2.) That both the plaintiff company and the Berwind-White Coal Mining Company depend upon the Pennsylvania Railroad for ma-keting their coal and all the said coal is loaded under substantially the same conditions, and the nature and character of the service required from the Pennsylvania Railroad Company by both the plaintiff and the Berwind-White Coal Mining Company in marketing their product is substantially the same."

Affirmed.

"(3.) That the Pennsylvania Railroad Company is a common

carrier by virtue of its charter and the laws of the State of Pennsylvania creating said company and governing common carriers."

Affirmed.

"(4.) That in the operation of the business of the plaintiff company and also of the Berwind-White Coal Mining Company, cars were ordered as required from said defendant company without respect to the uses to which said cars were to be put, except that they were for the loading and transportation of coal."

Affirmed.

"(5.) That according to a system recognized by the defendant company and also by the various shippers of coal along its line, the mines of the different operators were rated according to their capacity to produce coal, which rating was for the purpose of determining the percentage or pro rata of cars or facilities that should be furnished to the various operators for the purpose of loading or shipping their product, and said rating was fixed by the defendant company."

Affirmed.

417 "(6.) That the plaintiff's mines were rated as follows: Puritan No. 1, 36 cars per diem from April 1st, 1902, to April 30th, 1903, and 900 tons per diem from May 1st, 1903 to December 31st, 1904; Puritan No. 3, 20 cars per diem from April 1st, 1902, to April 30th, 1903, and 500 tons per diem from May 1st, 1903, to August 19th, 1903; Puritan No. 5, 14 cars per diem from January 1st, 1903, to April 30th, 1903, and 300 tons per diem from May 1st, 1903, to December 31st, 1904."

Affirmed.

"(7.) That the mines of the Berwind-White Coal Mining Company were rated as follows: Eureka No. 30, 90 cars per diem or 2250 tons per diem for the entire period of the action; Eureka No. 31, 85 cars per diem from April 1st, 1902, to April 30th, 1903, and 2250 tons per diem from May 1st, 1903, to December 31st 1904; Eureka No. 32, 60 cars per diem from April 1st, 1902, to January 31st, 1903; 50 cars per diem from February 1st, 1903, to April 30th, 1903, and 1875 tons per diem from May 1st, 1903, to December 31st, 1904; Eureka No. 33, 45 cars per diem from April 1st, 1902, to January 31st, 1903; 50 cars per diem from February 1st, 1903, to April 30th, 1903, and 1250 tons per diem from May 1st, 1903, to December 31st, 1903; Eureka No. 34, 60 cars per diem from April 1st, 1902, to January 31st, 1903; 65 cars per diem from February 1st, 1903, to April 30th, 1903, and 1625 tons per diem from May 1st, 1903, to December 31st, 1904; Eureka No. 35, 75 cars per diem from April 1st, 1902, to April 30th, 1903, and 2000 tons per diem from May 1st, 1903, to December 31st, 1904; Eureka No. 36, 50 cars per diem from April 1st, 1902, to January 31st, 1903; 60 cars per diem from February 1st, 1903, to April 30th, 1903, and 1625 tons per diem from May 1st, 1903, to December 31st, 1904; Eureka No. 37, 45 cars per diem from April 1st, 1902, to January 31st, 1903; 60 cars per diem from February 1st, 1903, to April 30th, 1903, and 1625 tons per diem from May 1st, 1903, to Decem-

418 ber 31st, 1904; Eureka No. 38, 10 cars per diem from April 1st, 1902, to January 31st, 1903; 25 cars per diem from February 1st, 1903, to April 30th, 1903, and 750 tons per diem

from May 1st, 1903, to December 31st, 1904; Eureka No. 39, 10 cars per diem from April 1st, 1902, to April 30th, 1903, and 375 tons per diem from May 1st, 1903, to December 31st, 1904; Yellow Run, 40 cars per diem from April 1st, 1902, to April 30th, 1903, and 875 tons per diem from May 1st, 1903, to December 31st, 1904."

Affirmed.

"(8.) That the ratable proportion of cars that the plaintiff's mines and the Berwind-White Coal Mining Company's mines were entitled to receive based on the foregoing ratings established by the defendant from April 1st, 1902 to December 31st, 1902, is Berwind-White Coal Mining Company, 91.05%—Puritan mines 8.95%; for January, 1903, Berwind-White Coal Mining Company, 89.06%—Puritan mines, 10.94%; February, 1903, Berwind-White Coal Mining Company, 89.70%—Puritan mines, 10.30% March, 1903, Berwind-White Coal Mining Company, 89.70%—Puritan mines 10.30%; April, 1903, Berwind-White Coal Mining Company, 89.70%—Puritan mines, 10.30%; from May 1st, 1903 to August 19th, 1903, Berwind-White Coal Mining Company, 90.65%—Puritan mines 9.35%; from August 20th, 1903 to December 31st, 1904, Berwind-White Coal Mining Company 93.22%—Puritan mines, 6.78%."

Affirmed, although by the true measure of damages as found by the court the above finding is immaterial, except as it may show discrimination.

"(9.) That the total capacity in cars, the cars received and the percentage of cars received to capacity during the period covered by this action in comparing the plaintiff's mines with the mines of the Berwind-White Coal Mining Company, are as follows:

419

	Total capacity in cars as cars.	Total cars received.	Percentage of cars rec'd to capacity.
Berwind mines	446,720	198,850	44.5%
Puritan 1, 3 and 5	39,148	12,905	32.9%
Total capacity Berwind and Puritan			485,868 cars
Total cars received Berwind and Puritan			211,755 cars
Berwind should have had	194,694 cars or		91-943/1000%
Puritan should have had	17,061 cars or		8-057/1000%
Puritan received	12,905 cars		
Puritan short	4,156 cars."		

Affirmed, although immaterial, except as it shows discrimination.

"(10.) That the number of cars received by the plaintiff's mines and the Berwind-White Coal Mining Company's mines, counting steel cars as two, which was the rule in force during the period of this action, as well as the statement of the cars that should have been received on the rated capacity of the respective mines, is as follows:—

Berwind Cars Received, Counting Steel as Two.

	Steel cars.		Other cars.	
E. #30	11988		17329	
E. #31	15214		15644	
E. #32	10536		11038	
E. #33	9785		6973	
E. #34	11696		7048	
E. #35	11662		12287	
E. #36	9433		12019	
E. #37	10265	201318 Steel	8309	
E. #38	1916	98191 Others	2039	
E. #39	1119		1105	
Y. R. C. Co.	5745	299509 Cars	4400	
	100659		98191	198850
	2			
	201318			

420 *Puritan Cars Received on Same Basis.*

	Steel cars.		Others.
Puritan #1	2198	6128 Steel	7849
Puritan #3	461	9841 Others	970
Puritan #5	405		1022
		15969 Cars	
	3064		9841
	2		3064
	6128		12905

Total Cars Received (Steel as Two).

Berwind	299509	
Puritan	15969	
	315478	Grand Total

Berwind should have had	91–943/1000%	or 290060	cars
Puritan should have	8–057/1000%	or 25418	"
Puritan shortage (averaged for whole period)		9449	"
Puritan shortage taken month by month and totaled for entire period		9834.2	cars"

Affirmed, as showing discrimination, but not for the purpose of estimating damages.

"(10½.) That the number of cars received by the plaintiff's mines and the Berwind-White Coal Mining Company's mines, count-

ing steel cars as two, but excluding individual cars, as well as the statement of the cars that should have been received on that basis on the rated capacity of the respective mines is as follows:—

Berwind cars received counting steel as two, excluding individual cars	225,656	
Puritan cars received on same basis	8,920	
Total	234,576	cars
Berwind should have had .....91.943/1000% or	215,677	cars
Puritan should have had.....8.057/1000% or	18,899	cars
Puritan shortage (averaged for whole period).....	9,979	cars
Puritan shortage taken month by month and totaled for entire period	10,623.9	cars"

421 Affirmed, as showing discrimination but not as the basis of an estimate of damages.

"(11.) That the total number of cars received by the respective mines above referred to and the total number of individual cars received during the period covered by the action, with the respective proportions borne by each thereof to total cars and to capacity as well as to each other are as follows:—

	Berwind-White.	Puritan Mines.
Total capacity in cars of 25 tons each..	446,720	39,143
Total cars received counting steel as two.	299,509	15,969
Percentage of cars received to capacity.	67.02%	40.79%
Total individual cars received.....	73,853	7,059
Total all other cars received.....	225,656	8,910
Proportion individual to total cars received	24.66%	44.20%
Proportion of tonnage shipped in other than individual cars	75.34%	55.80%
Proportion borne by individual cars received to total capacity	16.53%	18.03%
Proportion borne by cars received (excluding individual) to total capacity.	50.51%	22.76%"

Affirmed, as showing discrimination but not as a basis for estimating damages.

"(12.) That it is shown by the testimony in this case, evidenced by the telegraphic orders emanating from the officers in charge of the operation of the defendant company, that beginning in the Summer or Fall of 1902 a series of special orders for special consignments of cars to the Berwind-White Coal Mining Company was issued and executed by the officers and train crews of the defendant company, unless prevented by occasional accidents, giving the Berwind-
422 White Coal Mining Company a preference in the distribution of cars on the defendant company's lines for use in the coal trade on the S. Fork and Scalp Level Division which orders

intended to give and did give to the Berwind-White Coal Mining Company a preference in the distribution of said cars up to 500 cars per day with direction also to withdraw from 150 to 250 cars daily from the general supply to be held over each evening in readiness for the use of the Berwind-White Coal Mining Company on the following day, and that said orders were never rescinded during the period covered by this action."

Affirmed.

"(13.) That in pursuance of said orders and special assignments, the defendant company did in the distribution of its cars, distribute said 500 cars or whatever portion thereof was on its lines above its necessities for fuel coal to said Berwind-White Coal Mining Company, before any cars were delivered to the plaintiff company."

Affirmed.

"(14.) That in May, 1902, and during the balance of that year and for substantially all of the year 1903, the soft coal trade in Pennsylvania along the lines of the defendant company was unusually active, and that by reason of said unusual activity and demand for coal, the defendant company was unable to furnish all the cars demanded by the operators, among whom was the plaintiff and the Berwind-White Coal Mining Company, for one reason among others, that defendant did not then own and have in operation sufficient coal cars to supply the existing demand."

Affirmed.

"(15.) That in the month of July, 1902, the defendant company sold to the Berwind-White Coal Mining Company out of its equipment then on hand, and on its lines in operation in the coal trade, 727 steel coal cars, and agreed to sell and deliver 273 additional cars of like character out of equipment then ordered and in course of construction for it, all of which cars were delivered to the
423 Berwind-White Coal Mining Company, and thereafter devoted exclusively to their use during the period of this action."

Affirmed.

"(16.) That by reason of the facts found in the foregoing paragraphs, the delivery of cars by the defendant to the plaintiff company was irregular and uncertain. That during a portion of the time the mines of plaintiff were idle from one to three or more successive days at a time, and a portion of plaintiff's mines were idle as much as ten days per month in which no cars were delivered, or insufficient cars to enable the mines to operate."

Affirmed.

"(17.) That as a mixed question of law and fact, the acts of the defendant above recited constituted an undue and unlawful discrimination against the plaintiff company and in favor of the Berwind-White Coal Mining Company."

Affirmed.

"(18.) That the mines of the plaintiff company were of sufficient capacity to produce coal to their rated capacity."

Affirmed.

"(19.) That the state of the coal market and the business of the plaintiff company were such as to enable the plaintiff to have sold during the period covered by this action substantially the capacity of its mines."

Affirmed.

"(20.) That the business of the plaintiff was of such a character it did sell of its output from 73% to 96% delivered on board cars at its mines within the State of Pennsylvania, and that it could have sold and would have sold of the output it was entitled to load a like percentage on board cars at mines within the State of Pennsylvania."

Affirmed.

424 "(21). That if the plaintiff had been furnished with facilities to run its mines substantially to 75% of their capacity, it could have loaded and would have loaded its product at a cost including royalty of $1.10 per ton, and that the fair market price for said coal that it could have loaded and would have loaded had the defendant furnished the facilities to which the plaintiff was so entitled month by month during the period of this action was as follows:—

Month.	Average price coal sold.
1902.	
April	$1.24
May	1.45
June	2.40
July	2.19
Aug.	1.73
Sept.	2.07
Oct.	3.73
Nov.	3.25
Dec.	4.24
1903.	
Jany.	4.72
Feby.	2.69
March	1.81
April	1.63
May	1.53
June	1.55
July	1.55
Aug.	1.48
Sept.	1.49
Oct.	1.42
Nov.	1.45
Dec.	1.40
1904.	
Jany.	1.35
Feby.	1.31
March	1.34
April	1.31
May	....

June	....
July	....
Aug.	....
Sept.	1.17
Oct.	1.18
Nov.	1.17
Dec.	1.17"

425 Refused, for the reason that the average prices for coal sold, month by month, as appears in the above column, does not take into consideration the Baker Whitely Company contract and the Lovell Coal Company contract, to which said contracts it is fair to presume that a fair proportion of the additional coal which the plaintiff company could have shipped, would have been subject.

"(22). That a fair and reasonable deduction from the facts in this case showing the services rendered by the defendant to the plaintiff as compared with the services rendered to the Berwind-White Coal Mining Company, the cost of the coal, the selling price of the same and the damage suffered by the plaintiff will appear in the following schedules which are hereby found in this case:

(Here follow tables marked pages 426, 427, 428, and 429.)

MONTH.	Grand Total Cars Berwind and Puritan.	Berwind *Pro Rata* based on Capacity.	Puritan *Pro Rata* based on Capacity.	Cars Berwind should have received.	Cars Puritan should have received.	re
1902						
April	11796	91.05	8.95	10740.3	1055.7	
May	13057	91.05	8.95	11888.4	1168.6	
June	12470	91.05	8.95	11353.9	1116.1	
July	11900	91.05	8.95	10835.0	1065.0	
Aug	11883	91.05	8.95	10819.5	1063.5	
Sept	11495	91.05	8.95	10466.2	1028.8	
Oct	11283	91.05	8.95	10273.2	1009.8	
Nov	9908	91.05	8.95	9021.2	886.8	
Dec	8660	91.05	8.95	7884.9	775.1	
1903						
Jany	7255	89.06	10.94	6461.3	793.7	
Feby	9093	89.70	10.30	8156.4	936.6	
March	10316	89.70	10.30	9243.5	1062.5	
April	10188	89.70	10.30	9138.5	1049.4	
May	9226	90.65	9.35	8363.4	862.6	
June	9438	90.65	9.35	8555.5	882.5	
July	8815	90.65	9.35	7990.8	824.2	
Aug	5480	90.65	9.35	4967.6	512.4	
	3679	93.22	6.78	3429.6	249.4	
Sept	8435	93.22	6.78	7863.1	571.9	
Oct	8058	93.22	6.78	7511.7	546.3	
Nov	8594	93.22	6.78	8011.3	582.7	
Dec	8970	93.22	6.78	8361.8	608.2	
1904.						
Jany	8044	93.22	6.78	7498.6	545.4	
Feby	7900	93.22	6.78	7364.4	535.6	
March	9600	93.22	6.78	8949,1	650.9	
April	10376	93.22	6.78	9672.5	703.5	
May	9996	93.22	6.78	9318.3	677.7	
June	8937	93.22	6.78	8331.1	605.9	
July	8936	93.22	6.78	8330.1	605.9	
Aug	8366	93.22	6.78	7798.8	567.2	
Sept	8446	93.22	6.78	7873.4	572.6	
Oct	9111	93.22	6.78	8493.3	617.7	
Nov	8114	93.22	6.78	7563.9	550.1	
Dec	7653	93.22	6.78	7134.1	518.9	
	315478	.....	.....	289674.8	25803.2	

	Grand Total Cars Berwind and Puritan.	Berwind *Pro Rata* based on Capacity.	Puritan *Pro Rata* based on Capacity.	Cars Berwind should have received.	Cars Puritan should have received.	Cars actually received by Puritan.	Shortage in Puritan Car Supply.	Puritan Shortage in Tons at 25 tons to car.	Average Selling Price per ton.	P
.....	11796	91.05	8.95	10740.3	1055.7	533	522.7	13067.5	1.24	
.....	13057	91.05	8.95	11888.4	1168.6	684	484.6	12115.0	1.45	
.....	12470	91.05	8.95	11353.9	1116.1	558	558.1	13952.5	2.40	
.....	11900	91.05	8.95	10835.0	1065.0	622	443.0	11075.0	2.19	
.....	11883	91.05	8.95	10819.5	1063.5	586	477.5	11937.5	1.73	
.....	11495	91.05	8.95	10466.2	1028.8	629	399.8	9995.0	2.07	
.....	11283	91.05	8.95	10273.2	1009.8	572	437.8	10945.0	3.73	
.....	9908	91.05	8.95	9021.2	886.8	520	366.8	9170.0	3.25	
.....	8660	91.05	8.95	7884.9	775.1	390	385.1	9627.5	4.24	
.....	7255	89.06	10.94	6461.3	793.7	497	296.7	7417.5	4.72	
.....	9093	89.70	10.30	8156.4	936.6	427	509.6	12740.0	2.69	
.....	10316	89.70	10.30	9243.5	1062.5	665	397.5	9937.5	1.81	
.....	10188	89.70	10.30	9138.5	1049.4	560	489.4	12235.0	1.63	
.....	9226	90.65	9.35	8363.4	862.6	533	329.6	8240.0	1.53	
.....	9438	90.65	9.35	8555.5	882.5	591	291.5	7287.5	1.55	
.....	8815	90.65	9.35	7990.8	824.2	587	237.2	5930.0	1.55	
.....	5480	90.65	9.35	4967.6	512.4	333	179.4	4420.0	1.48	
	3679	93.22	6.78	3429.6	249.4	252				
.....	8435	93.22	6.78	7863.1	571.9	489	82.9	2072.5	1.49	
.....	8058	93.22	6.78	7511.7	546.3	500	46.3	1157.5	1.42	
.....	8594	93.22	6.78	8011.3	582.7	483	99.7	2492.5	1.45	
.....	8970	93.22	6.78	8361.8	608.2	504	104.2	2605.0	1.40	
.....	8044	93.22	6.78	7498.6	545.4	307	238.4	5960.0	1.35	
.....	7900	93.22	6.78	7364.4	535.6	365	170.6	4265.0	1.31	
.....	9600	93.22	6.78	8949.1	650.9	431	219.9	5497.5	1.34	
.....	10376	93.22	6.78	9672.5	703.5	420	283.5	7087.5	1.31	
.....	9996	93.22	6.78	9318.3	677.7	267	410.7	10267.5	.....	...
.....	8937	93.22	6.78	8331.1	605.9	357	248.9	6222.5	.....	...
.....	8936	93.22	6.78	8330.1	605.9	291	314.9	7872.5	.....	...
.....	8366	93.22	6.78	7798.8	567.2	402	165.2	4130.0	.....	...
.....	8446	93.22	6.78	7873.4	572.6	499	73.6	1840.0	1.17	
.....	9111	93.22	6.78	8493.3	617.7	348	269.7	6742.5	1.18	
.....	8114	93.22	6.78	7563.9	550.1	474	76.1	1902.5	1.17	
.....	7653	93.22	6.78	7134.1	518.9	293	225.9	5647.5	1.17	
	315478	.....	.....	289674.8	25803.2	15969	9834.2	245855.0	.....	...

	Cost of Production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss on Penna., Delivery.	Total Loss on Interstate Delivery.
	1.10	.14	1829.45	78.23	21.77	1431.18	398.27
	1.10	.35	4240.25	75.21	24.79	3189.09	1031.16
	1.10	1.30	18138.25	80.25	19.75	14555.95	3582.30
	1.10	1.09	12071.75	85.14	14.86	10277.89	1793.86
	1.10	.63	7520.63	88.86	11.14	6682.83	837.80
	1.10	.97	9695.15	81.88	18.12	7938.39	1756.76
	1.10	2.63	28785.35	86.79	13.21	24982.81	3802.54
	1.10	2.15	19715.50	86.93	13.07	17238.68	2476.82
	1.10	3.14	30230.35	91.05	8.95	27254.73	2975.62
	1.10	3.62	26851.35	92.27	7.73	24775.74	2075.61
	1.10	1.59	20256.60	88.46	11.54	17918.99	2337.61
	1.10	.71	7055.63	87.95	12.05	6205.43	850.20
	1.15	.48	5872.80	91.89	8.11	5396.52	476.28
	1.15	.38	3131.20	94.97	5.13	2973.70	157.50
	1.15	.40	2915.00	90.64	9.36	2642.16	272.84
	1.15	.40	2372.00	96.39	3.61	2286.37	85.63
	1.15	.33	1458.60	87.73	12.27	1279.63	178.97
	1.15	.34	704.65	86.86	13.14	612.06	92.59
	1.15	.27	312.53	85.90	14.10	286.46	44.07
	1.15	.30	747.75	90.06	9.94	673.42	74.33
	1.15	.25	651.25	93.97	6.03	611.98	39.27
	1.15	.20	1192.00	87.67	12.33	1045.02	146.98
	1.15	.16	682.40	73.88	26.12	504.16	178.24
	1.15	.19	1044.53	81.15	18.85	847.64	196.89
	1.15	.16	1134.00	83.94	16.06	951.88	182.12
...	.....	.....	.....	81.79	18.21		
...	.....	.....	.....	93.89	6.11		
...	.....	.....	.....	95.93	4.07		
...	.....	.....	.....	88.46	11.54		
	1.12	.05	92.00	80.95	19.05	74.47	17.53
	1.12	.06	404.55	90.59	9.49	366.48	38.07
	1.12	.05	95.13	73.72	26.28	70.13	25.00
	1.12	.05	282.38	80.40	19.52	277.27	55.11
...	.....	.....	209483.03	.....	.....	183283.06	26199.97

MONTH.	Grand Total Cars Berwind and Puritan. Excluding Individuals.	Berwind *Pro Rata* based on Capacity.	Puritan *Pro Rata* based on Capacity.	Cars Berwind should have received.	Cars Puritan should have received.	Cars actually received by Puritan, counting steels as two.	Shortage in Puritan Car Supply.	Puritan Shortage in Tons at 25 tons to car.	Average Selling Price per ton.	Cost of Production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss on Penna. Delivery.	Total Loss on Interstate Delivery.
1902																
April	10738	91.05	8.95	9776.9	961.1	327	634.1	15852.2	1.24	1.10	.14	2219.03	78.23	21.77	735.94	483.09
May	11959	91.05	8.95	10888.7	1070.3	383	687.3	17182.5	1.45	1.10	.35	6013.88	75.21	24.79	4523.04	1490.84
June	11286	91.05	8.95	10275.9	1010.1	316	694.1	17352.5	2.40	1.10	1.30	22558.25	80.25	19.75	18103.00	4455.25
July	10713	91.05	8.95	9754.2	958.8	383	575.8	14395.0	2.19	1.10	1.09	13690.55	85.14	14.86	13358.93	2331.62
Aug	10945	91.05	8.95	9965.4	981.6	363	618.6	15465.0	1.73	1.10	.63	0742.95	88.86	11.14	8657.59	1085.36
Sept	10080	91.05	8.95	9177.8	902.2	416	486.2	12155.0	2.07	1.10	.97	11790.35	81.88	18.12	9653.94	2136.41
Oct	9380	91.05	8.95	8540.5	839.5	363	486.5	12162.5	3.73	1.10	2.63	31987.38	86.79	13.21	27761.85	4225.53
Nov	8151	91.05	8.95	7421.5	729.5	232	497.5	12437.5	3.25	1.10	2.15	26740.63	86.93	13.07	23245.63	3495.00
Dec	7093	91.05	8.95	6458.2	634.8	168	466.8	11670.0	4.24	1.10	3.14	36643.80	91.05	13.07	33364.18	3279.62
1903																
Jany	6375	89.06	10.94	5677.6	694.4	402	295.4	7385.0	4.72	1.10	3.62	26727.70	92.27	7.73	24661.65	2066.05
Feby	7641	89.70	10.30	6854.0	787.0	297	490.0	12250.0	2.69	1.10	1.59	19477.50	88.46	11.54	17229.80	2247.70
March	7913	89.70	10.30	7098.0	815.9	435	380.0	9500.0	1.81	1.10	.71	6745.00	87.95	12.05	5932.23	812.77
April	7459	89.70	10.30	6690.8	768.2	306	462.2	11555.0	1.63	1.15	.48	5546.40	91.89	8.11	5093.59	452.81
May	6425	90.65	9.35	5824.3	600.7	267	333.7	8342.5	1.53	1.15	.38	3170.15	94.97	5.13	3010.69	159.46
June	6218	90.65	9.35	5636.6	581.4	347	234.4	5860.0	1.55	1.15	.40	2344.00	90.64	9.36	2124.60	219.40
July	5711	90.65	9.35	5177.0	534.0	305	229.0	5725.0	1.55	1.15	.40	2290.00	96.39	3.61	2207.33	82.67
Aug	3253	90.65	9.35	2948.8	304.2	264	40.2	2315.0	1.48	1.15	.33	763.95	87.73	12.27	670.21	93.74
	2278	93.22	6.78	2123.6	154.4	102	52.4									
Sept	4861	93.22	6.78	4531.4	329.6	249	80.6	2015.0	1.49	1.15	.34	685.10	86.86	13.14	595.08	90.02
Oct	4293	93.22	6.78	4001.9	291.1	220	71.1	1777.5	1.42	1.15	.27	391.08	85.90	14.10	335.94	55.14
Nov	5317	93.22	6.78	4056.5	360.5	228	132.5	3312.5	1.45	1.15	.30	993.75	90.06	9.94	894.97	98.78
Dec	6146	93.22	6.78	5729.3	416.7	245	171.7	4292.5	1.40	1.15	.25	1073.13	93.97	6.03	1008.42	64.71
1904.																
Jany	5779	93.22	6.78	5387.2	391.8	128	263.8	6595.0	1.35	1.15	.20	1319.00	87.67	12.33		
Feby	5308	93.22	6.78	4948.1	359.9	165	194.9	4872.5	1.31	1.15	.16	659.60	73.88	26.12	1156.37	162.63
March	6684	93.22	6.78	6320.8	453.2	199	254.2	6355.0	1.34	1.15	.19	1207.45	81.15	18.85	487.31	172.29
April	8059	93.22	6.78	7512.6	546.4	183	363.4	9085.0	1.31	1.15	.16	1453.60	83.94	16.06	979.84	227.61
May	7311	93.22	6.78	6815.3	495.7	48	447.7	11192.5	.....	.....	.....	.....	81.79	18.21	1220.15	233.45
June	5646	93.22	6.78	5263.2	382.8	233	149.8	3745.0	.....	.....	.....	.....	95.89	6.11		
July	6264	93.22	6.78	5939.3	424.7	184	240.7	6017.5	.....	.....	.....	.....	95.93	4.07		
Aug	4931	93.22	6.78	4596.7	334.3	270	64.3	1607.5	.....	.....	.....	.....	88.46	11.54		
Sept	4799	93.22	6.78	4473.6	325.4	372	46.6	(OVER)	1.17	1.12	.05	.....	80.95	19.05		
Oct	5901	93.22	6.78	5501.0	400.0	206	194.0	4850.0	1.18	1.12	.06	291.00	90.59	9.49	263.62	27.38
Nov	4568	93.22	6.78	4258.3	309.7	215	94.7	2367.5	1.17	1.12	.05	118.38	73.72	26.28	87.26	31.12
Dec	5091	93.22	6.78	4745.8	345.2	109	236.2	5905.0	1.17	1.12	.05	295.25	80.48	19.52	237.62	57.63
	234576	.....	.....	215080.8	19495.2	8920	10623.4	265594.7	.....	.....	.....	238938.86	.....	.....	208600.78	30338.08

This statement excludes individual cars.

430 Refused, for the reason that said two schedules, which are the same compilations as shown in plaintiff's exhibits 12 and 13 of the testimony, are comparisons made only between the service rendered to the Berwind-White Coal Mining Company and the service rendered to the Puritan Coal Company and gives the plaintiff company in this suit all of the excess of cars as shown by such comparison. As we look at this case, the excess of cars furnished to the Berwind-White Coal Mining Company were not taken alone, from the plaintiff company, but were taken from the Mountain Division, of which the plaintiff company was entitled to but a percentage varying from 8.2 per cent. up to 9.7 per cent. and down as low as 5.6 per cent., as shown in the schedule on which the court has based its estimate of damages. The only theory on which the schedules referred to in this point could be sustained would be that the plaintiff company, as well as all other companies of the Mountain Division were entitled to the same proportionate number of cars as were the Berwind-White Coal Mining Company, in a comparison of ratings made between the contesting company and said preferred company. This would lead to an excessive assessment of damages, and proves the falsity of the premises. The true measure of damages, as we believe, is that shown in the telegrams offered in evidence going to show that the Berwind-White Coal Mining Company was preferred to the extent of an arbitrary number of cars furnished daily during the period of the action, which cars were taken from the Mountain Division in order that they might be given to the preferred shipper. The discrimination was common alike to all the shippers of the Mountain Division, therefore, rather than to the individual shipper of that division, and the individual shipper of the Mountain Division, as was the Puritan Company, is entitled to only its pro rata of the cars of which the Mountain Division was deprived by virtue of the defendant company's preference, discrimination or favoritism shown to the Berwind-White Coal Mining Company.

431 Defendant's Requests for Findings of Fact.

"1. Subsequent to the institution of this action, James S. Whitely, Charles H. Brown and George E. Scott, the only stockholders of the Puritan Company at the time of the commencement of the action and during the period embraced therein, sold their stock in the Puritan Coal Mining Company, reserving to themselves individually the claim covered by the present action. By the terms of the sale it was stipulated that for the purpose of the prosecution of the present action the said Brown, Whitely and Scott were to have access to the books and papers of the plaintiff company, and the right to make use of the same and to have the right to continue the prosecution of the pending action in the name of the Puritan Coal Mining Company, and to the use of all the rights and remedies of that company for such purpose, subject to the right of the purchaser of the stock, should he so elect, to have the claim assigned to the said Brown, Whitely and Scott, coupled with the right to the

use of the name of the Puritan Coal Mining Company to the use of said Brown, Whitely and Scott in the present action. It was a further condition of said sale that if the claim were settled and payment made to the Puritan Coal Mining Company or its successor, the proceeds were to be turned over to said Brown, Whitely and Scott, who were to have entire control of any adjustment or settlement of the said claim or of the present action."

Affirmed, as a general statement of the letter contract by which James S. Whitely, Charles H. Brown and George E. Scott, stockholders of the Puritan Company, sold their stock to John C. Martin. The contract, as we construe it, does not amount to an assignment of the claim against the defendant company, but was a method of fixing in the former stockholders an alternative price for their stock, increased or to be increased by the amount of recovery against the defendant company in the suit then brought.

432 "2. The ratings given by the defendant to the mines of the plaintiff for purposes of car distribution were fair to the plaintiff and subjected it to no discrimination or disadvantage."

Affirmed.

"3. The aggregate ratings in cars of the plaintiff's mines, ascertained with reference to the number of days on which they would have been in a position to work had they had cars, were 39,146 cars, made up as follows:

Puritan No. 1, 36 cars for 711 days	35,596
Puritan No. 3, 20 cars for 359 days	7,180
Puritan No. 5, 14 cars for 84 days, 1,176} 12 cars for 433 days, 5,196}	6,178
Total	39,146"

Affirmed, as a rating for an arbitrary number of days during the period as fixed by George E. Scott in his testimony.

"4. The defendant, for the purpose of enabling it to make distribution of its equipment during the period of the action divided the coal territory as a whole tributary to its line into a number of districts or regions. The mines of the plaintiff were situated in what was known as the 'Mountain' or 'Pittsburgh East End' Region. The aggregate ratings of the mines in this region during the period of the action, ascertained with reference to the number of days on which distribution of cars were made by the defendant, were as follows:

1902 (April 1 to Dec. 31)	224,663
1903	247,411
1904	266,740
Total	738,814"

This is affirmed as a part of defendant's Exhibit No. 11. The notes of testimony do not show any examination or cross

433 examination with reference to it, and the court has not been

able to confirm the data from the sheets themselves. Neither is there anything in the record to show the basis of calculation either as to the number of days or the kinds and classes of cars.

"5. The aggregate ratings of the plaintiff's mines during the period of the action, ascertained with reference to the whole number of days on which the defendant made distribution of its cars, were as follows:

	1902. (Apr. 1 to Dec. 31.)	1903.	1904.	
Puritan #1	8388	11088	11232	30708
Puritan #3	4660	4100	....	8760
Puritan #5	364	3900	3744	8008
Combined ratings 1, 3, 5..	13412	19088	14976	
Aggregate combined ratings for whole period.....				47476"

We assume that this can be affirmed as the defendant's mathematical deduction from the sheets. We do not find any data in the notes of testimony to confirm the figures given. There is nothing to show the exact number of days on which the calculation is made nor does it show the data on which it is based, that is, whether it is of cars as cars, on tonnage or on an equalization of the cars. If offered for the purpose of showing the percentage of ratings out of the Mountain Division to which the plaintiff company was entitled, it must be inaccurate, for the accurate percentages as given by the distribution sheets themselves appear in the court's ninth finding of fact, and would not agree fully with the percentage based on the figures of this point as compared with the preceding point.

"6. The aggregate ratings of all mines of all regions combined, with the exception of the Allegheny Region, were, during the period of the action, as follows:—

434	1902 (April 1st, to December 31st).....	1,574,796
	1903	1,818,202
1904	.....	2,016,898
	Total	5,409,896

"The mines in the Allegheny Region were not supplied by cars moving or passing through Altoona, but with cars that came from the West. The mines in all other regions were supplied from cars which passed through Altoona, and were subject to the distribution directed from the general superintendent's office at that place."

Affirmed, although not believed to be material or relevant to the issue.

"7. The defendant had in force during the period of the action rules or regulations which, by their terms, provided for a pro rata distribution of cars at all mines which were on its distribution sheets, the pro rata of each mine being ascertained with reference to the percentage which its rating bore to the ratings of all mines. During

this period, however, special orders for cars were frequently issued, which provided for the delivery of cars to certain operators irrespective of the consideration whether they would or would not have been entitled to such cars under the regularly prescribed method of distribution. These special orders were carried out through and under the supervision of the general superintendent at Altoona. The cars delivered thereunder were first deducted from those available for distribution on any day, and the remaining cars were allotted among the coal operators in the various regions."

This request cannot be affirmed under the testimony. It is true that the defendant had in force regulations providing generally for a pro rata distribution of cars to the various regions into
435 which their bituminous coal territory was divided. It is also true that special orders for cars were issued, but it is not shown in testimony, except by inference, that any other general special orders were issued favoring any other company than the Berwind-White Coal Mining Company. The special orders given favoring the Berwind-White Coal Mining Company so far as the evidence shows, were existent throughout the period of the action. The testimony, however, does not show that after deducting the cars delivered under special orders there was a general allotment to the coal operators of the various regions. The diversion of cars for distribution on any day to the Berwind-White Coal Mining Co. on special orders, according to a number of telegrams, affected the distribution of cars only so far as two divisions, namely, the Mountain and South Fork and Scalp Level Divisions, are concerned. If the defendant wanted to establish any other theory of allotment to the various regions as claimed in this point, it had it in its power to do so by testimony. The testimony, as we understand it, clearly shows that whatever diversion or departure from equitable distribution of cars to the preferred shipper was from the Mountain Division alone, and this is clearly evidenced by the telegrams offered by the plaintiff.

"8. Assuming that the plaintiff did not during the period of the action receive the benefit of any special orders, the number of cars which the plaintiff received during the period of the action was diminished to the extent to which cars were delivered under special assignments in the distribution of which it would otherwise have shared or participated. As any cars deducted from the general allotment or distribution and delivered under special orders would otherwise have gone into the general distribution, the plaintiff, as the result of deliveries of cars under special orders, was not deprived of the aggregate of such deliveries, but only of its proportionate share thereof."

436 Refused, as a whole, for the reasons as given in the refusal of No. 7. The point is predicated on the theory that the cars granted to the preferred shipper on the special orders, were drawn from the general distribution, whereas the evidence of the telegrams is convincing that such preference in cars was to the injury of the Mountain Division alone.

"9. The plaintiff's aggregate ratings in cars, taking the period

of the action as a whole, was 47,476. The aggregate ratings of the mines in the regions among which any cars delivered under special orders would otherwise have been distributed, amounted to 5,409,896 cars. Under a pro rata distribution the plaintiff would, therefore, have been entitled to less than nine-tenths of one per cent of any cars delivered under special orders to other operators which were in excess of their pro rata allotment."

Refused. The plaintiff's claim, and the testimony to sustain it, tend to clearly show a preference in car distribution affecting the Mountain Division alone. If it did not do so, it was in the power and was the duty of the defendant company to present the facts on which to base this point.

"10. Special orders relative to the delivery of cars at the mines of the Berwind-White Coal Mining Company, which were located in the 'South Fork' or 'Scalp Level' region, were issued from time to time during the period of the action, directing the delivery to that company, with some variations, of the equivalent of 500 cars per day, counting a steel car as two cars. The aggregate number of cars delivered in the period of the action under these orders was as follows, counting a steel car as equal to two cars:

Year and month.	Total cars placed.
1902.	
April	11,263
May	12,373
June	11,912
July	11,278
August	11,297
September	10,866
October	10,711
November	9,388
December	8,270
1903.	
January	6,758
February	8,666
March	9,651
April	9,628
May	8,693
June	8,847
July	8,228
August	3,427
September	7,946
October	7,558
November	8,111
December	8,466
1904.	
January	7,737
February	7,335
March	9,169
April	9,956

May	9,729
June	8,580
July	8,645
August	7,964
September	7,947
October	8,763
November	7,640
December	7,360
Total	299,509

"Of the cars delivered as above, 73,853 were the individual or private cars of the Berwind-White Coal Mining Company. The number of cars which the Berwind-White Coal Mining Com-
438 pany would have received had it received its pro rata distribution unaffected by special orders cannot be ascertained or computed from any evidence presented in the case."

That portion of the point, exclusive of the last sentence, is affirmed. The last sentence is refused as immaterial to the issue, for the reason that the distribution sheets offered in evidence to furnish the data on which the discrimination as against the Mountain Division can be fully ascertained.

"11. The cars delivered to the Berwind-White Coal Mining Company referred to in the preceding finding of fact were used by it with the acquiescence of the defendant for shipments to points both within and without the State of Pennsylvania. Seventy-five per cent of the cars were used for shipments to Jersey City; 20 per cent for shipments to Greenwich, Philadelphia, the coal so shipped being intended and ultimately shipped by water to points outside of the State of Pennsylvania; and the remaining 5 per cent of the cars were used for shipments to points in Pennsylvania, New York, New Jersey and other States. All of the coal shipped by the Berwind-White Coal Mining Company either to Jersey City or to Greenwich was shipped consigned to itself at those points."

Affirmed.

"12. Of the cars delivered by the defendant to the plaintiff in the period of the action between 80 per cent and 90 per cent were loaded by the plaintiff with coal sold by it to purchasers who had bought the coal f. o. b. the cars at the mines. The following shows the total number of tons loaded each month, the percentage thereof which was sold f. o. b. the cars at the mines, and the percentage otherwise disposed of:

439

Month and year.	Total tons.	F. O. B. sale.	Otherwise.
1902.			
April	17,824	78.23	21.77
May	20,544	75.21	24.79
June	17,500	80.25	19.75
July	18,167	85.14	14.86
August	18,211	88.86	11.14
September	19,459	81.88	18.12
October	17,887	86.79	13.21
November	15,238	86.93	13.07
December	14,284	91.05	8.95
	159,114		
1903.			
January	13,751	92.27	7.73
February	12,284	88.46	11.54
March	19,306	87.95	12.05
April	19,048	91.89	8.11
May	15,472	94.97	5.13
June	18,601	90.64	9.36
July	17,450	96.39	3.61
August	15,135	87.73	12.27
September	15,082	86.86	13.14
October	15,756	85.90	14.10
November	15,822	90.06	9.94
December	15,358	93.97	6.03
	194,065		
1904.			
January	10,305	87.67	12.33
February	11,989	73.88	26.12
March	14,446	81.15	18.85
April	12,537	93.94	16.06
May	10,311	81.79	18.21
June	10,559	91.79	6.11
July	8,120	95.93	4.07
August	12,694	88.46	11.54
September	13,692	80.95	19.05
October	11,949	90.59	9.49
November	16,115	73.72	26.28
December	10,119	80.48	19.52"

Affirmed.

"13. The plaintiff in the case of coal sold by it to purchasers f. o. b. the cars at the mines consigned the coal so sold to the purchaser at the point at which the latter desired delivery thereof to be
440 made. Of the plaintiff's total tonnage shipped in cars delivered to it by the defendant, 88,808 tons were shipped in cars consigned to points within the State of Pennsylvania, and

407,413 tons to points without the State of Pennsylvania. The total tonnage so shipped and the division thereof as between points of consignment within and without the State of Pennsylvania was as follows:

	Tonnage billed for consignee to Pennsylvania points.	Tonnage bill(ed) for consignee to points outside Pennsylvania.
1902.		
April	1,071	16,753
May	2,429	18,115
June	2,862	14,638
July	2,384	15,783
Aug.	2,500	15,711
Sept.	2,067	17,392
Oct.	2,776	15,111
Nov.	1,885	13,353
Dec.	2,585	11,699
1903.		
Jan.	2,982	10,769
Feb.	1,239	11,045
March	2,506	16,800
April	1,851	17,197
May	3,272	12,200
June	3,504	15,097
July	2,841	14,609
Aug.	1,838	14,297
Sept.	3,967	11,115
Oct.	1,918	13,838
Nov.	2,159	13,663
Dec.	2,625	12,753"
1904.		
Jan.	3,132	7,173
Feb.	3,127	8,862
March	3,966	10,480
April	4,140	8,397
May	1,806	8,305
June	3,299	7,260
July	2,634	5,486
Aug.	3,452	9,242
Sept.	3,257	110,435
Oct.	3,232	8,717
Nov.	2,687	13,428
Dec.	2,609	7,510"

Affirmed.

441 "14. The number of cars delivered to the Berwind-White Coal Mining Company and used by it for its State shipments during the period of the action constituted a smaller percentage of its rating than the cars received by the plaintiff and used by it for its State shipments constituted of its rating."

Affirmed, although immaterial to the issue.

"15. It was the practice of the plaintiff to contract for the sale and delivery of its coal under contracts running for the so-called 'coal' year, that is, from April 1st to April 1st, in each year. It had entered into such contracts for the years beginning April 1st, 1902, April 1st, 1903, and April 1st, 1904. By the terms of these contracts the plaintiff was excused from making deliveries thereunder in the event that it was unable to secure cars for the transportation of the coal. In each of the years the plaintiff failed to make deliveries of the total amount of tonnage covered by these contracts.

"In the year beginning April 1st, 1902, the aggregate amount which it had failed to deliver under its contracts was 44,568 tons. In 1903 it was 40,224 tons, and in 1904 it was 64,254 tons. The average price which the plaintiff would have realized on the 44,568 tons of coal in 1902 which was not delivered under its contracts was $1.55 per ton; the average price in 1903 which it would have received would have been $1.76 per ton; and in 1904 it would have been $1.31 per ton."

This point cannot be affirmed as a whole. In the table of contracts for the sale of coal obtained from George E. Scott, there is an apparent shortage in delivery, but as explained by Mr. Scott in the same connection there was a substantial compliance with the majority of the contracts. The contracts themselves show that they were for an amount approximating the fixed sum and Mr. Scott testified that all of them had been filled to the satisfaction of their customers. The total shortage for each year as claimed in the second paragraph of this point, we assume is made up from the tables of contracts offered in evidence by the defendant, including the Baker-Whitely Company contract and the Lovell Coal Com-
442 pany contract and may be substantially correct as to the amount considering them, without at the same time considering the effect of Mr. Scott's testimony as to the substantial compliance of their general contracts. The request, as we look at it, affects only the question of the price per ton in estimating damages and in the calculation made by the court we have taken the unfilled contracts into consideration in making such estimate.

"16. By the terms of the lease under which the plaintiff operated its No. 3 mine, it was required to deliver to the lessor under said lease, viz., the Lovell Coal Mining Company, 24,000 gross tons of coal in equal monthly installments, with the privilege to the said lessor of requiring the delivery of an additional 26,000 tons in equal monthly installments, and, in addition thereto, one-half of any tonnage mined by the plaintiff company in excess of 100,000 tons per year.

"The price which the plaintiff was to receive for all coal delivered to its lessor, pursuant to the terms of said lease, was 70c per gross ton, which was to be increased or diminished to the same extent that the cost of mining such coal was increased or diminished by a change in the cost of mining or labor.

"This lease remained effective from April 1st, 1902, until July 1st, 1903. In this period the number of tons delivered by the

plaintiff company to the Lovell Coal Mining Company was as follows:

Year and month.	Tons.
1902.	
April	1839
May	2150
June	2037
July	2164
August	1766
September	1847
October	1320
November	1044
December	822
1903.	
January	1192
February	843
March	1261
April	2412
May	2006
June	1399"

443 This point is affirmed as substantially a correct statement of the contract between the plaintiff company and the Lovell Coal Mining Company. It could be refused, however, as being immaterial and irrelevant to the issue that is being tried. The relative rights of the plaintiff and the Lovell Coal Mining Company cannot be adjudicated in this action. The obligations of the plaintiff to said company, as to whether or not it performed its contract with the Lovell Coal Mining Company, cannot excuse the performance by the defendant of its duty to the plaintiff company. Moreover there is no testimony or evidence in the case to show that the Lovell Coal Mining Company required the plaintiff company to make deliveries of a greater quantity of coal than it did make. The facts set forth in the point, therefore, as well as all other facts in the case relating to unfilled contracts, are only considered by the court with reference to their influence on the price per ton for the coal which plaintiff company alleges it could have mined and did not by reason of the discrimination practiced against it by the defendant company.

"17. The plaintiff was the owner of certain private or individual cars. On May 31st, 1904, it requested the defendant to deliver five of these cars daily to another operation, and this order or direction remained unrevoked throughout the balance of the year 1904."

Affirmed, as explained by Mr. Scott, to the effect that these cars were Baker-Whitely Company cars, which said company controlled for its own use and which five cars were diverted to the use of the Stineman Coal Company. They were not the cars which the plaintiff company owned as a corporation, but which they had simply leased or controlled for the coal to be taken by the Baker-Whitely Company.

"18. By an oral agreement between the Lovell Coal Mining Company and the plaintiff the latter was obligated to pay to the former an amount equal to one-half of the selling price of the output of its Mines Nos. 3 and 5, after first deducting the expenses of mining, royalties due to the owner of the coal, and the cost of supplies. This obligation continued in force until the sale of its rights in said mines to William A. Price of Altoona, Pennsylvania, thereafter the plaintiff company, by virtue of agreements in writing with said Price of July 14th, 1903, and April 1st, 1904, found itself to make payments to the said Price similar to those which it had previously been under obligation to make to the Lovell Coal Mining Company."

Affirmed, as a correct statement of the contract mentioned. It could be refused, however, as being wholly immaterial and irrelevant to the issue. This part of the contract we do not believe even affects the price per ton to which the plaintiff may be entitled on coal which it failed to ship by reason of the discriminatory acts of the defendant.

"19. The cars sold by the defendant to the Berwind-White Coal Mining Company, referred to in the plaintiff's statement of claim, and in the evidence, adduced upon the trial of the case, were delivered by the defendant in installments extending over a period of time which commenced in August, 1902, and terminated, except as to a few cars, which were delivered later, in December of that year. The defendant immediately upon the making of the sale of said cars, and prior to any deliveries thereof, ordered cars to replace those sold and the delivery of the cars covered by this replacement order was finally completed in the latter part of November, 1902."

Affirmed, except that 273 of the cars ordered were to be delivered to Berwind-White Coal Mining Company.

"20. The plaintiff kept a daily record of the cars received and loaded by it at each of its mines. This record also showed the number of cars, if any, which, at 4.30 P. M. each day, when the mines stopped work were on its mine siding, and were still unloaded and empty. The number of days in each month of the period covered by the action on which unloaded empty cars were on the plaintiff's mine sidings at 4.30 P. M. and the aggregate number of such cars (counting a steel car as two) in each month, were as follows:

Month and year.	No. 1 mine.		No. 3 mine.		No. 5 mine.	
1902.	Number of days.	Number of cars.	Number of days.	Number of cars.	No. of days.	No. of cars.
April	19	231	18	233	.....	.....
May	24	317	24	262	.....	.....
June	18	216	22	271	.....	.....
July	14	123	21	145	.....	.....
August ..	18	231	18	154	.....	.....
September.	19	318	16	82	.....	.....
October ..	20	329	17	150	.....	.....
November.	14	199	5	32	.....	.....
December.	10	113	9	57	7	40
1903.						
January .	13	136	9	32	16	49
February .	10	106	18	110	14	89
March ...	22	285	25	252	25	140
April	25	405	24	373	25	269
May	22	249	25	196	21	63
June	24	448	25	221	26	152
July	25	354	20	133	22	95
August ..	24	395	.....	.....	22	170
September.	25	439	.....	.....	20	81
October ..	24	267	.....	.....	17	57
November.	23	363	.....	.....	16	61
December.	24	444	.....	.....	18	82
1904.						
January .	22	280	.....	.....	14	61
February .	21	299	.....	.....	17	75
March ...	23	403	.....	.....	19	84
April	24	357	.....	.....	17	105
September.	24	343	.....	.....	24	135
October ..	25	414	.....	.....	23	129
November.	24	378	.....	.....	22	120
December.	16	202	.....	.....	10	46
	596	8646	294	2703	395	2103"

446 Affirmed, as we presume it is a correct summary of Defendant's Exhibit No. 10, running from page 353 to page 381, inclusive, of the testimony, although we have not by calculation confirmed the same.

"21. The plaintiff continued to operate its mines Nos. 1 and 5 until the end of the year 1908. No claim is made that in the years 1905, 1906, 1907 and 1908, the plaintiff was subjected to any discrimination. In December, 1908, the plaintiff sold all its property and assets, excepting accounts due the Puritan Coal Mining Company and the claim against the Pennsylvania Railroad Company, for which the present action was brought, to one John C. Martin, for the

cash consideration which is set forth and mentioned in the defendant's Exhibit No. 1."

Affirmed.

"22. The lines of railroad operated by the defendant extend beyond the limits of the State of Pennsylvania. It is engaged in interstate commerce both over its own lines and in conjunction with railroads whose lines connect with it. The bituminous coal which is transported by it is transported from mines located in the State of Pennsylvania to points both within and without the State."

Affirmed.

"23. The defendant in making distribution of its coal cars during the period of the action did not make one distribution for State shipments, and a separate or distinct one for interstate shipments. It made but one distribution, and imposed no restrictions as to their use upon the operator to whom the cars were delivered, leaving it open to him to use the cars either for State or for interstate shipments, as he might elect."

Affirmed.

The following propositions of law are believed to be applicable to the determination of the issues involved in this case:—

447 First. That the court has jurisdiction of the cause of action, and that the plaintiff is entitled to recover, if it shows acts of discrimination on the part of the defendant company in violation of the common law, as well as in violation of the Constitution and Statute Laws of the State of Pennsylvania.

Second. That the defendant company as a common carrier was bound to extend to all persons under similar circumstances and conditions, and during the same period of time, the equal enjoyment of all its facilities for transportation. That among such facilities of transportation, in connection with bituminous coal trade in Pennsylvania, the distribution of cars to the mines is one of the greatest importance.

Third. That the evidence in this case, disclosed by the telegrams from the principal officers of the defendant company to other officers or subordinates of said company, indicates that during the entire period of the action from April 1st, 1902, to December 31st, 1904, the defendant company did give to the Berwind-White Coal Mining Company a decided and substantial advantage or preference in the distribution of its coal cars, both as to the number distributed and as to the kind, character and time of delivery or service of such cars in carrying out the special orders indicated in said telegrams. That said special orders and the carrying out of the same, as testified to, operated greatly to the prejudice and disadvantage of the plaintiff company in its shipment of coal, and amounts to an unlawful, undue and unreasonable discrimination against the plaintiff company, entitling it to recover such reasonable damages as will compensate said company for the loss sustained.

Fourth. That the sale by the defendant company of 1000 of its steel cars, on July 1st, 1902, to the Berwind-White Coal Min-

448 ing Company, during a time when there was a claimed shortage in the supply of coal cars owned by the defendant com-

pany, and during a time of great stress in the coal business, was an undue and unreasonable discriminatory act on the part of the defendant company and worked to the prejudice of the plaintiff company. That the undue and unreasonable character of this discrimination is not lessened by virtue of the fact that the said defendant company did order 1000 cars to replace the coal cars so sold, but rather emphasizes the intent and purpose to give preference to the said Berwind-White Coal Mining Company.

Fifth. That the injuries sustained by the plaintiff company by virtue of the said acts of preference referred to in the third and fourth points above, operated against the plaintiff company, as owners of mines located on the Mountain Division of the defendant company, according to its pro rata share of cars out of the whole number of cars allotted to said division. That the discrimination practiced, as shown by the telegrams and other testimony in this case, was against the Mountain Division as a whole, and that therefore the measure of damages to which the plaintiff company is entitled must be measured by its pro rata share of the cars which should have been allotted to the division, rather than by a comparison between the plaintiff company alone and the preferred shipper.

Sixth. That the plaintiff's right to recover in this case by reason of the discriminatory acts of the defendant is not limited by the coal shipped to points within the State of Pennsylvania, but is entitled to recover in addition thereto for whatever coal it can reasonably show it could have mined, and sold f. o. b. cars at the mines, had it not been discriminated against. That coal so sold by the plaintiff company, no matter what its ultimate destination in the hands of its vendees is commerce within the State for which it has a right of action as between the plaintiff company and the defendant company in the State courts.

449 Seventh. That by virtue of the undue, unlawful and unreasonable discrimination practiced in this case the plaintiff is entitled to recover from the defendant an amount which will compensate it for the loss sustained as damages for such discriminatory acts, and that such loss is measured by the profit on coal which it was prevented from mining and selling by reason of said discriminatory acts. That the profit to which said company is entitled is the difference between the cost of production, together with the royalty paid for the coal, and the fair market value of the coal f. o. b. cars at the mines as indicated by the evidence on said market values, and in this case as influenced, controlled or modified by the actual contracts which the plaintiff company had outstanding and to which a portion of the said coal which it was prevented from shipping would have been subject. That in addition to the sum so ascertained, plaintiff is entitled to recover as compensation or damages for delay a sum the equivalent of interest on the total amount of damages so ascertained, which we hereby assess at forty-five per cent of the whole.

Plaintiff's Requests for Findings of Law.

"(1.) That it is the duty of the defendant and all common carriers of like character within the State of Pennsylvania, under ordinary circumstances, to furnish sufficient facilities to miners and shippers of coal to receive and transport their products to market."

Affirmed.

"(2.) That it is the duty of said defendant company to treat all of its patrons with equality and not unduly and unreasonably to discriminate in favor of or against shippers situate in substantially the same conditions and circumstances, and not to favor one shipper to the prejudice or disadvantage of another."

Affirmed.

450 "(3.) That the testimony in this case does not show that any reason existed to warrant the defendant in departing from the rule requiring ratably equal treatment of shippers on its line who were situate in substantially similar conditions and circumstances."

Affirmed.

"(4.) That the business of the plaintiff and of the Berwind-White Coal Mining Company in the mining, producing and shipping of coal *were* located and conducted under conditions and circumstances substantially similar, and the plaintiff was entitled at the hands of the defendant to a car supply ratably equal with that of the Berwind-White Coal Mining Company."

Affirmed.

"(5.) That the special orders referred to in the findings of fact and the execution of the same by the defendant company, as well as the sale of 1,000 of its cars by the defendant company in time of great stress in its coal business to one of its shippers, *was* an unjust, undue, unreasonable and unlawful discrimination against the plaintiff to its prejudice and disadvantage."

Affirmed.

"(6.) That shipments by plaintiff of its product which were sold f. o. b. cars at the mines, upon which the freight was paid by the consignees and destination entirely controlled by the consignees, constituted intrastate business, and not interstate business as between the plaintiff and defendant."

Affirmed.

"(7.) That the plaintiff is entitled to recover in this case the reasonably fair profit on the coal that it was prevented from mining and selling by reason of the undue and unlawful discrimination of the defendant, which profit would be the difference between
451 the cost of production of the coal plus the royalty and the fair market value of the same."

Affirmed.

"(8.) If by virtue of the undue and unreasonable discrimination practiced in this case the plaintiff suffered damage at the hands of the defendant, it is entitled to recover in this action on the amount of coal it could have sold and would have been able to ship delivered

f. o. b. cars at mines, but for the said discrimination of the defendant."

Affirmed.

"(9.) The plaintiff is entitled to recover as compensation for delay, interest upon the damages as ascertained, such interest to be averaged."

Affirmed.

Requests on Behalf of Defendant for Findings of Law.

"1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the 'Interstate Commerce Acts,' in the Federal tribunals."

Refused.

"2. The plaintiff is not entitled to recover because the evidence has established that it has parted with its ownership of the claim which forms the basis of the action, is not now the owner thereof, and is not entitled to the proceeds of any recovery that may be had thereon."

Refused. This point is based on the effect of a contract between the stockholders of the Puritan Coal Mining Company and John C. Martin, as shown in Defendant's Exhibit No. 1. That con-
452 tract does not justify a finding that the Puritan Coal Mining Company, acting as a corporation, either by its stockholders or directors, ever assigned or attempted to assign this claim. In fact there is no evidence of any corporate action on the subject. The contract is fairly construed as one by which the stock and property of the Puritan Coal Mining Company was vested in John C. Martin, the price for which without this claim against the railroad company was on a fixed basis for said stock. The Puritan Coal Mining Company as a corporate entity was preserved in its existence for the purpose of carrying on this case against the defendant company, then already brought, to its conclusion and the price of the stock of said company was to be increased by whatever amount should be recovered from the defendant corporation in this litigation. To our mind there is nothing illegal in such contract and nothing to destroy its validity or to destroy the claim as against the defendant corporation, being a valid and subsisting claim at the time of this contract.

"3. Under the law and the evidence the plaintiff is not entitled to recover."

Refused.

"4. Any right of action that the plaintiff can assert is limited to the loss, if any, which it sustained due to its inability to ship 64,587 tons of coal in the period of the action."

Refused. This point is based on the fact that the plaintiff company, by its statement of claim first filed, claimed for loss in shipment of 64,587 tons of coal during the period of the action, and by its later statement filed a claim for a very much larger amount. The difference in these amounts arose, as explained by Mr. Scott in his

testimony, from the fact that he was advised by counsel after making his first statement that he had a right to include coal sold by his company f. o. b. cars at the mines, as well as coal actually
453 shipped to points within the State. We have already passed upon this point in an opinion allowing the amendment. The cause of action in both statements is the same, namely, alleged discrimination in preferences extended to the Berwind-White Coal Mining Company. In our judgment, no change in the cause of action, either in the statement or in the evidence offered to support the statement, can be claimed.

"5. Plaintiff's right of action as defined and limited by its statement of claim, extends to and embraces only the loss, if any, which it sustained due to its being deprived, as the result of deliveries of cars to the Berwind-White Coal Mining Company, of the number of cars which its rating and percentage based thereon entitled it to receive of the total number of cars distributed by the defendant, and which it would have received had the Berwind-White Coal Mining Company received only its pro rata of the cars distributed."

Refused.

"6. The burden is upon the plaintiff to establish the extent to which cars delivered to the Berwind-White Coal Mining Company affected or diminished the number which it, the plaintiff, would have received, as pro rata of those distributed. It has not presented any evidence to show to what extent, if any, the cars delivered to the Berwind-White Coal Mining Company were in excess of that company's pro rata share of those distributed and consequently no basis is afforded for ascertaining to what extent, if any, plaintiff's pro rata share of the cars distributed was affected or diminished by the deliveries made to the Berwind-White Coal Mining Company. The plaintiff, therefore, is not entitled to recover."

Refused.

"7. The extent of the excess, if any, in the number of cars delivered to the Berwind-White Coal Mining Company can
454 only be ascertained by finding, in the first place, the number that company would have received had it received its pro rata share. Its pro rata share cannot be ascertained with reference to, nor be measured by, the number of cars which any one shipper received. As the plaintiff has presented no evidence to show what the pro rata share of the Berwind-White Coal Mining Company would have been, no basis is presented for ascertaining or determining to what extent, if any, the cars delivered to the Berwind-White Company exceeded its pro rata share. The plaintiff, therefore, is not entitled to recover."

Refused.

"8. If there were evidence from which it could be ascertained that the cars delivered to the Berwind-White Coal Mining Company were in excess of its pro rata share, and the extent of such excess could be shown, the share or proportion of such excess cars which the plaintiff can properly claim should have been delivered to it would be such number as would bear the same relation to the whole number of excess cars as the ratings of the plaintiff's mines bore to

the ratings of the mines in all regions affected by the withdrawal of such excess cars from the general distribution. The plaintiff would consequently have been entitled to less than nine-tenths of one per cent. of these cars."

Refused.

"9. The plaintiff's right of action in the present case is limited to the loss, if any, resulting from its inability to sell and ship whatever proportion of the additional tonnage it would have mined and shipped had more cars been available to it, which would have constituted its State shipments as distinguished from its interstate shipments."

Affirmed, if by the point is meant that no interstate shipments of the plaintiff can be recovered in this action.

"10. In determining whether the plaintiff was discriminated against because of deliveries of cars made to the Berwind-
455 White Coal Mining Company only those cars can be considered which were availed of by that company and by the plaintiff, respectively, for their intrastate shipments or business. Cars delivered by the defendant and used with its consent for interstate shipments must necessarily be excluded from consideration in determining whether the defendant had been guilty of any discrimination prohibited by the statutes of the State of Pennsylvania, for these statutes have no relation to, nor do they have any application to the distribution of cars by the defendant which are used for shipments of coal to points without the State of Pennsylvania."

Refused.

"11. As it appears from the evidence that the cars used by the plaintiff for its State shipments for deliveries of coal during the period of the action constituted a greater percentage of its mine rating than did the cars so used by the Berwind-White Company, the defendant has not been shown by the evidence to have been guilty of any unlawful discrimination cognizable in this action."

Refused.

Discussion of Law and Fact.

The principal facts, upon which the general charge of discrimination is founded, are without contradiction or dispute. No testimony was offered to excuse or palliate the effect of the special distribution orders issued by the principal officers of the company and executed by the subordinates. That such actions on the part of the common carrier amount to discrimination, seriously injurious to other shippers of a like product, needs no discussion or argument.

The measure of damages fixed by the court in our findings herein, based on the plaintiff company's pro rata of the shortage of cars diverted from the Mountain Division to the South Fork and Scalp Level Division, is, in our judgment, equally clear and requires no discussion further than that already given in answers to points.

456 The principal defenses offered on behalf of the defendant corporation are those of law. "First. That the plaintiff is

not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by Acts of Congress, commonly known as the 'Interstate Commerce Acts,' in the Federal tribunals. Second. If the distribution of its cars made by the defendant is not subject, as a whole, to the regulations prescribed by the Interstate Commerce Acts, the State courts can take cognizance of actions brought by shippers complaining of such distribution only to the extent to which the cars embraced in such distribution were used for State shipments or transportation. Third. The number of cars which the plaintiff used for State shipments or transportation, and the number which it would have used of any additional cars, had it received them, for such transportation is to be ascertained and measured by the number used, and which would have been used, by it for shipments to points within the State of Pennsylvania, regardless of the consideration that title to some of the coal so transported might have passed from plaintiff to purchaser who bought f. o. b. the mines."

These several positions are so co-related that so far as we will briefly discuss them we will treat them together.

The defendant claims that the Interstate Commerce Act provides exclusive remedies in Federal jurisdictions. Said Interstate Commerce Act is as follows: "Section 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." "Section 9. That any person or persons claiming to be damaged by any
457 common carrier subject to the provisions of this Act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of damages for which such common carrier may be liable under the provisions of this Act, in any district, or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." As we understand the contention of defendant, it is that under said Interstate Commerce Act exclusive jurisdiction is conferred either upon the Interstate Commerce Commission or upon the Federal Courts, and that such exclusive jurisdiction ousts entirely any action in our State courts and under State laws. No United States Supreme Court authority is offered in support of this position. The authorities referred to are in the Circuit or District Courts, as follows: Northern Pacific Railway Co. vs. Pacific Coast Lumber Manufacturers Association, 165 Federal Reporter, page 1, in which case is also cited Van Patten vs. Chicago, Milwaukee & St. Paul Railway Co., 74 Federal Reporter,

981, and Sheldon vs. Wabash Railroad Co., 105 Federal Reporter, 785.

Discrimination by carriers as to rates and facilities was a violation of common law and was a violation of statutory and constitutional law in this State long prior to the passage of the Interstate Commerce Act, and, as said in Tift vs. Southern Railway, 123 Federal Reporter, 789, and the cases therein cited, "These special remedies afforded by the Interstate Commerce Act are intended to supplement and not to supplant the remedies the citizen already enjoys. Said remedies are cumulative and not exclusive, as is shown by the text of the Act itself, setting forth an intention not to abridge or alter remedies existing by common law or statute." As is said by Justice Henderson, in Wright vs. Adams Express Co., 43 Penna. Superior Court, 40, approved by the Supreme Court in quoting the full
458 opinion of Justice Henderson in the same case, 230 Pa. St., 635-640, after citing several United States cases: "The conclusion of these cases was reached in accordance with the doctrine that the regulation of the rights and duties of all persons under the jurisdiction of the State belongs in the first instance to the State because of its reserved power to provide for the safety of the persons and property within its territory, and that this right is not taken away from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority in a State is in conflict with an Act of Congress or is an attempt to regulate interstate commerce." As we understand the law, regulations of interstate commerce, established by virtue of an Act of Congress, do not necessarily take away from the citizen the right to recover damages under a State statute. An instance of this is the case of Missouri, K. & T. R. Co. vs. Haber, 169 U. S., 613. There a Kansas statute gave a right of action in the State courts for damages to domestic cattle from contagious diseases brought into the State on a railroad doing an interstate business. In said case it is declared that such statute is not a regulation of interstate commerce but only declares a rule of civil liability and was passed in execution of the power of the State to protect the rights of property and to provide for the redress of wrong within its limits. General legislation prescribing the duties of citizens of a State and their liabilities is not open to any valid objection because it may affect persons engaged in interstate commerce or indirectly affect the commerce of the country. "Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." A State statute does not constitute a regulation of commerce among the States simply because it may incidentally affect such commerce. Hennington vs. Georgia, 163 U. S., 299-317; N. Y. N. H. & H. Ry. Co. vs. New York, 165 U. S., 628-631; R. & A. R. R. Co. vs. Patterson Tobacco Co., 169 U. S. 311. Our Pennsylvania Constitution, Article 17, Sections 3 and 7, expressly forbid all kinds of discrimination
459 by railroad companies. This was followed by the Act of 1883, which reads as follows "SECTION 1. Be it enacted that any undue or unreasonable discrimination by any railroad company

or other common carrier, or any officer, superintendent, manager or agent thereof, in charges for, or facilities for, the transportation of freight within this State or coming from or going to any other State, is hereby declared to be unlawful. Section 2. * * * Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies, or the furnishing of facilities for transportation. * * *" We know of no good reason why the Pennsylvania State Act of 1883 and the Interstate Commerce Act referred to cannot both stand and be enforced under proper circumstances and conditions. "A carrier exercising its calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the law of the State for acts of nonfeasance or of misfeasance committed within its limits. * * * Rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are not in themselves regulations of interstate commerce although they control in some degree the conduct and the liability of those engaged in such commerce." Chicago, M. & St. P. R. R. Co. vs. Solan, 169 U. S., 133-138. The whole tenor of the authorities, when a conflict between the State and Federal statutes is in question, seem to indicate that where a State statute is exacted in execution of a reserved power of the State, such statute is not held to be inconsistent with an Act of Congress passed in execution of a clear power under the Federal Constitution, unless the repugnance is so direct and positive that the two Acts cannot be reconciled or stand together. The test is whether Congress has provided a different measure of liability. Chicago, M. & St. P. R. Co. vs. Solan (supra). Pennsylvania Railroad vs. Hughes, 191 U. S., 489-491.

460 The defendant contends further that Section 3 of the Interstate Commerce Act imposes obligations upon railroad companies in respect to distribution of cars in times of car shortage. Citing in support of this position, Baltimore & Ohio R. R. Co. vs. U. S. Ex Rel. Pitcairn Coal Co., 215 U. S., 481, and Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S., 452. The latter case is an appeal to the Supreme Court of the United States from the judgment entered by a Circuit Court of the United States, overruling the action of the Interstate Commerce Commission respecting certain car distribution orders made by said Commission. The question decided by Mr. Justice White, now Chief Justice of the Supreme Court of the United States, is stated very distinctly by him in the opening sentence of his opinion as being "whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question to be here decided." He affirms the power of the Commission, even in case of cars distributed to a coal company for the use of the railroad company alone. This may be conceded, yet it does not follow that for violation of our own constitution and State statute a citizen who does a purely State business has no remedy in the State courts. Nor has the Supreme Court anywhere so laid down the law. If the po-

sition taken by the learned counsel for the defendant is correct, the
it follows as a logical sequence that because the Pennsylvania Rail
road is concededly engaged in interstate commerce a party who i
a shipper on said railroad, not interested or engaged in interstat
commerce but whose shipments are entirely confined to points withi
the State and who is discriminated against by the railroad compan
in refusing him equal and just car distribution, could have n
remedy in any court. As a defense to an action in the State Cour
all the Pennsylvania Railroad Company would need to do would b
to establish the fact it was engaged in interstate commerce busines

If the party then resorted to the United States Court, all th
461 defendant would need to do would be to establish the fact tha
the plaintiff was not engaged in interstate commerce busines

The plaintiff would be thrown out of court in either case. In ou
judgment both enactments must stand together and be enforced b
the courts under proper circumstances and conditions. That this i
the view taken by our own Appellate Courts is beyond controversy
In Wright vs. B. & O. R. R. Co., 32 Superior Court 5, a recovery i
the lower court was affirmed. One of the questions involved was a
to whether the shipment of coal was within or without the State
As is said in the opinion of Justice Henderson, "No question of inte
state commerce arises, if the testimony of the plaintiff is believed
According to his evidence Salisbury Junction was the point of de
livery. The court instructed the jury that if the contract betwee
the plaintiff and Smyth was for the shipment of coal beyond th
limits of Pennsylvania, that would end the case; but that if the ship
ment was to a point only within Pennsylvania the case was withi
the jurisdiction of the court. The verdict shows that the jury foun
the fact to be as alleged by the plaintiff. It may be that it was th
intention of Smith that the coal should be shipped from Salisbur
Junction to a point without the State, but the plaintiff's relation t
the coal terminated at Salisbury Junction. Taking the plaintiff'
evidence as true, the service was to be wholly within the State o
Pennsylvania and would be presumably subject to the laws of thi
State." In Hillsdale Coal and Coke Company vs. Pennsylvania
Railroad Co., 229 Pa. St., 61-67, a recovery in a case from this county
was allowed in the lower court for profits on coal which it was pre
vented from shipping "to points and places within the State o
Pennsylvania." On appeal to the Supreme Court and in an opinio
by Mr. Justice Potter, page 67, he says, "The Interstate Commerc
Commission would have no jurisdiction over a claim for damage
sustained in connection with commerce wholly within the State

and therefore the suit pending before that body could no
462 affect the plaintiff's right to recover for the damages her
claimed."

In view of these State authorities, it would seem that the bal
question of jurisdiction is no longer an open one in this State, and
this court could not be expected to apply a different rule. These au
thorities moreover have special application to the question raised by
the second and third contentions of defendant's counsel. The plain
tiff claimed for and the court has allowed recovery on the basis o

coal which it was deprived from shipping f. o. b. cars at the mines without regard to the point of shipment, whether within or without the State after being moved from the tipple by the defendant company. The case of Wright vs. B. & O. R. R. Co. (supra) is a direct authority on this question. That case, so far as the question of intrastate or interstate business was concerned, turned on the place as to where the plaintiff's relation to the coal ceased. The plaintiff in this case does not claim for coal which it was under contract to deliver outside of Pennsylvania. It claims only for coal sold f. o. b. cars at the mines, which is the point at which the plaintiff's rights over the coal ceased, and for coal shipped to points within the State. In other words, it was not commerce in the sense in which it is used in the Interstate Commerce Act until it passed into the control of the common carrier. Thereafter it was subject to the control of the consignee absolutely, and if then by his direction it passed beyond the borders of the State, it then became the subject of interstate commerce as between said consignee and the carrier. The plaintiff's delivery was a Pennsylvania delivery. After leaving the mine, delivered to the defendant company and under the control of the consignee, it was beyond the control of the plaintiff as appears conclusively from the following authorities. Mull vs. P. R. R., 38 Pa. Superior Court, 416. Dannemiller vs. Kirkpatrick, 201 Pa. St., 218. Dentzel vs. Island Park Ass'n., 229 Pa. St., 403. Diehl vs. McCormick, 143 Pa. St., 584. 463 The United States authorities are to the same effect. Goods are not exports or in process of exportation until committed to a common carrier for transportation out of the State or started on such ultimate passage. When actually in transit to another State, property becomes the subject of interstate commerce and ceases to be governed by domestic law with respect to taxes and begin to be governed by the national law of commercial regulation. Coe vs. Errol, 116 U. S., 517. Diamond Match Co. vs. Ontonagon, 188 U. S., 82. Kelley vs. Rhoads, 188 U. S., 1. P. & S. Coal Co. vs. Bates, 156 U. S., 577. Brown vs. Houston, 114 U. S., 622.

In the bituminous coal trade the furnishing of car facilities is similar to that of furnishing sidings. Bituminous coal can not be stored but must be shipped promptly after being moved to the tipple. The furnishing of cars as a transportation facility is therefore on the same plane as that of a siding. These cars so furnished serve a dual purpose, one that of loading, the other that of transporting. As a facility for loading, if denied equal rights with others, it would be discrimination as against the operator. If he sold his coal f. o. b. at the mines, it would be purely a Pennsylvania business as between him and the common carrier, yet he would be discriminated against if denied equal facilities with others whether they shipped within or without the State. The right of recovery in such case is, therefore, similar to that in the case of Minds vs. the Pennsylvania R. R. Co., 228 Pa. St., 575. That was a case involving the denial of a siding and a recovery was allowed, which recovery was affirmed by the Supreme Court, and the same learned counsel for the defendants did not raise any question as to State or interstate shipments. The prin-

ciple involved in that case would clearly have to be reversed if the position now taken by the learned counsel for the defendant is correct.

From the authorities already cited and the principles involved in this case, it seems clear that this court has jurisdiction and that the plaintiff has a right to recover for the coal which it has
464–507 reasonably shown it could have sold f. o. b. cars at the mines had it not been unfairly treated. All other questions of law involved have been discussed in connection with the requests for findings of law and fact submitted. The plaintiff is entitled to a decree for judgment in accordance with this opinion and for an amount as set out in the findings of fact.

Decree.

Now, December 29th, 1911, in accordance with the above opinion, verdict is directed to be entered in favor of the plaintiff and against the defendant in the sum of $74,323.88.

By the Court.

ALLISON O. SMITH, *P. J.*

* * * * * * *

508 May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Opinion and Decree.

Filed Feb. 12, 1912. John H. Moore, Prothonotary.

509 In the Court of Common Pleas of Clearfield County, May Term, 1908.

No. 221.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Exceptions to Findings of Fact and Law.

IX. Opinion Filed.

Exceptions having been filed by both the plaintiff and defendant to the Findings of Fact and Law in the above stated case, and Saturday, February 3d, having been fixed as the time for argument on

id exceptions, hearing was had on said date and the same argued
r counsel.

The plaintiff's exceptions are herein answered seriatum as follows:

"(1.) The court erred in its fourteenth finding of fact in that found the price of coal which the plaintiff could have mined and sold but for the unlawful discrimination of the defendant, to be affected by the Baker Whitely Company contract or the Lovell Coal Company tract, inasmuch as there is no idence to show that either of said contracts demanded or could ve demanded more coal than they received, and by giving effect said contracts the court thereby reduced the price of coal which found the plaintiff would have received lower than is justified by e evidence."

Ruling: This exception is overruled. We believe the price of coal found in the court's fourteenth finding of fact is a fair deduction om all of the evidence in the case. The plaintiff is not entitled the highest prices paid for free coal in the region during the strike riod, but is entitled only to such price as would be the average both free coal and contract coal, and this general average we think e have struck under the evidence in this case.

"(2.) The court erred in its finding of fact in answer to the aintiff's eighth request, which request and finding are as follows:

" 'That the ratable proportion of cars that the plaintiff's mines d the Berwind-White Coal Mining Company's mines were entitled receive based on the foregoing ratings established by the defendt from April 1, 1902, to December 31, 1902, is: Berwind-White al Mining Company, 91.05%; Puritan mines, 8.95%; for January, 03, Berwind-White Coal Mining Company, 89.06%; Puritan ines, 10.94%; February, 1903, Berwind-White Coal Mining Comny, 89.70%; Puritan mines, 10.30%; March, 1903, Berwindhite Coal Mining Company, 89.70%; Puritan mines, 10.30%; pril, 1903, Berwind-White Coal Mining Company, 89.70%; Purin mines, 10.30%; from May 1st, 1903, to August 19th, 1903, Bernd-White Coal Mining Company, 90.65%; Puritan mines, 9.35%; om August 20th, 1903, to December 31, 1904, Berwind-White al Mining Company, 92.22%; Puritan mines, 6.78%.'

" 'Affirmed, although by the true measure of damages as found by the court, the above finding is immaterial except as it may show discrimination.'

"The plaintiff contends the facts as stated in said request are maial in fixing the price."

Ruling: This exception is also overruled. We are unable to see w the percentages named are material in fixing price. They are aterial, however, in showing discrimination, and for that reason e point was affirmed.

"3. The court erred in answer to the twenty-first request for findg of fact for the plaintiff which finding and answer thereto are as llows:

" 'That if the plaintiff had been furnished with facilities to run mines substantially to 75% of their capacity, it could have loaded d would have loaded its product at a cost including royalty of .10 per ton, and that the fair market price for said coal that it

could have loaded and would have loaded had the defendant furnished the facilities to which the plaintiff was so entitled month by month during the period of this action was as follows:

Month.	Average price coal sold.
1902.	
April	$1.24
May	1.45
June	2.40
July	2.19
Aug.	1.73
Sept.	2.07
Oct.	3.73
Nov.	3.25
Dec.	4.24
1903.	
Jan.	4.72
Feb'y	2.69
Mar.	1.81
Apr.	1.63
May	1.53
June	1.55
July	1.55
Aug.	1.48
Sept.	1.49
Oct.	1.42
Nov.	1.45
Dec.	1.40

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1904.	
Jan'y	1.35
Feb'y	1.31
March	1.34
April	1.31
May	....
June	....
July	....
Aug.	....
Sept.	1.17
Oct.	1.18
Nov.	1.17
Dec.	1.17'

" 'Refused for the reason that the average prices for coal sold month by month, as appears in the above column, does not take into consideration the Baker-Whitely Company contract and the Lovell Coal Company contract, to which said contracts it is fair to presume that a fair proportion of the additional coal which the plaintiff company could have shipped, would have been subject.'

MONTH.	Grand Total Cars Berwind and Puritan.	Berwind *Pro Rata* based on Capacity.	Puritan *Pro Rata* based on Capacity.	Cars Berwind should have received.
1902				
April	11796	91.05	8.95	10740.3
May	13057	91.05	8.95	11888.4
June	12470	91.05	8.95	11353.9
July	11900	91.05	8.95	10835.0
Aug	11883	91.05	8.95	10819.5
Sept	11495	91.05	8.95	10466.2
Oct	11283	91.05	8.95	10273.2
Nov	9908	91.05	8.95	9021.2
Dec	8660	91.05	8.95	7884.9
1903				
Jany	7255	89.06	10.94	6461.3
Feby	9093	89.70	10.30	8156.4
March	10316	89.70	10.30	9243.5
April	10188	89.70	10.30	9138.5
May	9226	90.65	9.35	8363.4
June	9438	90.65	9.35	8555.5
July	8815	90.65	9.35	7990.8
Aug	5480	90.65	9.35	4967.6
	3679	93.22	6.78	3429.6
Sept	8435	93.22	6.78	7863.1
Oct	8058	93.22	6.78	7511.7
Nov	8594	93.22	6.78	8011.3
Dec	8970	93.22	6.78	8361.8
1904.				
Jany	8044	93.22	6.78	7498.6
Feby	7900	93.22	6.78	7364.4
March	9600	93.22	6.78	8949.1
April	10376	93.22	6.78	9672.5
May	9996	93.22	6.78	9318.3
June	8937	93.22	6.78	8331.1
July	8936	93.22	6.78	8330.1
Aug	3366	93.22	6.78	7798.8
Sept	8446	93.22	6.78	7873.4
Oct	9111	93.22	6.78	8493.3
Nov	8114	93.22	6.78	7563.9
Dec	7653	93.22	6.78	7134.1
	315478	.....	.....	289674.8

	Grand Total Cars Berwind and Puritan.	Berwind *Pro Rata* based on Capacity.	Puritan *Pro Rata* based on Capacity.	Cars Berwind should have received.	Cars Puritan should have received.	Cars actually received by Puritan.	Shortage in Puritan Car Supply.	Puritan Shortage in Tons at 25 tons to car.	Average Selling Price per ton.	Cost of Production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss on Penna. Delivery.	Total Loss on Interstate Delivery.
...	11796	91.05	8.95	10740.3	1055.7	533	522.7	13067.5	1.24	1.10	.14	1829.45	78.23	21.77	1431.18	398.27
...	13057	91.05	8.95	11888.4	1168.6	684	484.6	12115.0	1.45	1.10	.35	4240.25	75.21	24.79	3189.09	1031.16
...	12470	91.05	8.95	11353.9	1116.1	558	558.1	13952.5	2.40	1.10	1.30	18138.25	80.25	19.75	14555.95	3582.30
...	11900	91.05	8.95	10835.0	1065.0	622	443.0	11075.0	2.19	1.10	1.09	12071.75	85.14	14.86	10277.89	1793.86
...	11883	91.05	8.95	10819.5	1063.5	586	477.5	11937.5	1.73	1.10	.63	7520.63	88.86	11.14	6682.83	837.80
...	11495	91.05	8.95	10466.2	1028.8	629	399.8	9995.0	2.07	1.10	.97	9695.15	81.88	18.12	7938.39	1756.76
...	11283	91.05	8.95	10273.2	1009.8	572	437.8	10945.0	3.73	1.10	2.63	28785.35	86.79	13.21	24982.81	3802.54
...	9908	91.05	8.95	9021.2	886.8	520	366.8	9170.0	3.25	1.10	2.15	19715.50	86.93	13.07	17238.68	2476.82
...	8660	91.05	8.95	7884.9	775.1	390	385.1	9627.5	4.24	1.10	3.14	30230.35	91.05	8.95	27254.73	2975.62
...	7255	89.06	10.94	6461.3	793.7	497	296.7	7417.5	4.72	1.10	3.62	26851.35	92.27	7.73	24775.74	2075.61
...	9093	89.70	10.30	8156.4	936.6	427	509.6	12740.0	2.69	1.10	1.59	20256.60	88.46	11.54	17918.99	2337.61
...	10316	89.70	10.30	9243.5	1062.5	665	397.5	9937.5	1.81	1.10	.71	7055.63	87.95	12.05	6205.43	850.20
...	10188	89.70	10.30	9138.5	1049.4	560	489.4	12235.0	1.63	1.15	.48	5872.80	91.89	8.11	5396.52	476.28
...	9226	90.65	9.35	8363.4	862.6	533	329.6	8240.0	1.53	1.15	.38	3131.20	94.97	5.13	2973.70	157.50
...	9438	90.65	9.35	8555.5	882.5	591	291.5	7287.5	1.55	1.15	.40	2915.00	90.64	9.36	2642.16	272.84
...	8815	90.65	9.35	7990.8	824.2	587	237.2	5930.0	1.55	1.15	.40	2372.00	96.39	3.61	2286.37	85 63
...	5480	90.65	9.35	4967.6	512.4	333	179.4	4420.0	1.48	1.15	.33	1458.60	87.73	12.27	1279.63	178.97
	3679	93.22	6.78	3429.6	249.4	252										
...	8435	93.22	6.78	7863.1	571.9	489	82.9	2072.5	1.49	1.15	.34	704.65	86.86	13.14	612.06	92.59
...	8058	93.22	6.78	7511.7	546.3	500	46.3	1157.5	1.42	1.15	.27	312.53	85.90	14.10	286.46	44.07
...	8594	93.22	6.78	8011.3	582.7	483	99.7	2492.5	1.45	1.15	.30	747.75	90.06	9.94	673.42	74.33
...	8970	93.22	6.78	8361.8	608.2	504	104.2	2605.0	1.40	1.15	.25	651.25	93.97	6.03	611.98	39.27
...	8044	93.22	6.78	7498.6	545.4	307	238.4	5960.0	1.35	1.15	.20	1192.00	87.67	12.33	1045.02	146.98
...	7900	93.22	6.78	7364.4	535.6	365	170.6	4265.0	1.31	1.15	.16	682.40	73.88	26.12	504.16	178.24
...	9600	93.22	6.78	8949.1	650.9	431	219.9	5497.5	1.34	1.15	.19	1044.53	81.15	18.85	847.64	196.89
...	10376	93.22	6.78	9672.5	703.5	420	283.5	7087.5	1.31	1.15	.16	1134.00	83.94	16.06	951.88	182.12
...	9996	93.22	6.78	9318.3	677.7	267	410.7	10267.5	.....	.....	.....	.....	81.79	18.21		
...	8937	93.22	6.78	8331.1	605.9	357	248.9	6222.5	.....	.....	.....	.....	93.89	6.11		
...	8936	93.22	6.78	8330.1	605.9	291	314.9	7872.5	.....	.....	.....	.....	95.93	4.07		
...	8366	93.22	6.78	7798.8	567.2	402	165.2	4130.0	.....	.....	.....	.....	88.46	11.54		
...	8446	93.22	6.78	7873.4	572.6	499	73.6	1840.0	1.17	1.12	.05	92.00	80.95	19.05	74.47	17.53
...	9111	93.22	6.78	8493.3	617.7	348	269.7	6742.5	1.18	1.12	.06	404.55	90.59	9.49	366.48	38.07
...	8114	93.22	6.78	7563.9	550.1	474	76.1	1902.5	1.17	1.12	.05	95.13	73.72	26.28	70.13	25.00
...	7653	93.22	6.78	7134.1	518.9	293	225.9	5647.5	1.17	1.12	.05	282.38	80.40	19.52	277.27	55.11
	315478	.....	.....	289674.8	25803.2	15969	9834.2	245855.0	.....	.....	.....	209483.03	.....	.....	183283.06	26199.97

"The plaintiff contends that the evidence does not justify a reduction in price below the amount specified in said request."

Ruling: This exception is overruled, for the same reason as given in overruling the first exception.

"(4.) The court erred in answering the plaintiff's twenty-second request for finding of fact, which request and answer thereto are as follows:

" 'That a fair and reasonable deduction from the facts in this case showing the service rendered by the defendant to the plaintiff as compared with the service rendered to the Berwind-White Coal Mining Company, the cost of the coal, the selling price of the same and the damage suffered by the plaintiff will appear in the following schedules which are hereby found in this case:

(Here follow tables marked pages 513, 514, 515, and 516.)

517 "'Refused, for the reason that said two schedules, which are the same compilations as shown in plaintiff's Exhibit 12 and 13 of the testimony, are comparisons made only between the service rendered to the Berwind-White Coal Mining Company and the service rendered to the Puritan Coal Mining Company and gives the plaintiff company in this suit all of the excess of cars as shown by such comparison. As we look at this case, the excess of cars furnished to the Berwind-White Coal Mining Company were not taken alone from the plaintiff company but were taken from the Mountain Division, of which the plaintiff company was entitled to but a percentage varying from 8.2 per cent up to 9.7 per cent and down as low as 5.6 per cent, as shown in the schedule on which the court has based its estimate of damages. The only theory on which the schedules referred to in this point could be sustained would be that the plaintiff company, as well as all other companies of the Mountain Division were entitled to the same proportionate number of cars as were the Berwind-White Coal Mining Company, in a comparison of ratings made between the contesting company and said preferred company. This would lead to an excessive assessment of damages and proves the falsity of the premises. The true measure of damages, as we believe, is that shown in the telegrams offered in evidence going to show that the Berwind-White Coal Mining Company was preferred to the extent of an arbitrary number of cars furnished daily during the period of the action, which cars were taken from the Mountain Division in order that they might be given to the preferred shipper. The discrimination was common alike to all the shippers of the Mountain Division, therefore, rather than to the individual shipper of that division, and the individual shipper of the Mountain Division, as was the Puritan Company, is entitled to only its pro rata of the cars of which the Mountain Division was deprived by virtue of the defendant company's preference, discrimination or favoritism shown to the Berwind-White Coal Mining Company.'

518 "The contention of the plaintiff is that it was entitled to as large a percentage of cars as any other shipper situated substantially the same as the plaintiff and under substantially the same conditions."

Ruling: This exception is overruled. It refers to and covers one of the principal contentions in the case as to the measure of damages. The contention of the plaintiff that it is entitled to as large a percentage of cars as any other shipper situated substantially the same as the plaintiff and under substantially the same conditions leads to such an excess of damages that we believe that that fact alone proves the falsity of the theory. The law gives the injured party the right to recover damages measured by what will compensate him for his injury. All, therefore, it seems to us, that the plaintiff is entitled to is that which will compensate him for what he did not get of that to which he was entitled. To give him cars proportionate to what the favored shipper got would be to make him also a preferred and favored shipper in damages although not in cars. This surely is not contemplated by the legislation governing discriminatory acts.

"(5.) The court erred in answering the defendant's first request or finding of fact, which request and answer thereto are as follows:

" 'Subsequent to the institution of this action James S. Whitely, Charles H. Brown and George E. Scott, the only stockholders of the Puritan Company at the time of the commencement of the action and during the period embraced therein, sold their stock in the Puritan Coal Mining Company, reserving to themselves individually the claim covered by the present action. By the terms of the sale it was stipulated that for the purpose of the prosecution of the present action the said Brown, Whitely and Scott were to have access to the books and papers of the plaintiff company, and the right to make use of the same and to have the right to continue the prosecution of the pending action in the name of the Puritan Coal Mining Company, and to the use of all the rights and remedies of that company for such purpose, subject to the right of the 519 purchaser of the stock, should he so elect, to have the claim assigned to the said Brown, Whitely and Scott, coupled with the right to the use of the name of the Puritan Coal Mining Company to the use of said Brown, Whitely and Scott in the present action. It was a further condition of said sale that if the claim were settled and payment made to the Puritan Coal Mining Company or its successor, the proceeds were to be turned over to said Brown, Whitely and Scott, who were to have entire control of any adjustment or setttlement of the said claim or of the present action.'

" 'Affirmed, as a general statement of the letter contract by which James S. Whitely, Charles H. Brown and George E. Scott, stockholders of the Puritan Company, sold their stock to John C. Martin. The contract, as we construe it, does not amount to an assignment of the claim against the defendant company, but was a method of fixing in the former stockholders an alternative price for their stock, increased or to be increased by the amount of recovery against the defendant company in the suit then brought.'

"The error in said answer being in the first paragraph thereof. Said request should not have been affirmed at all, because the alleged facts therein stated are not justified by the evidence."

Ruling: This exception is overruled. The request affirmed as a whole is a fair statement of the contract in question. In its legal construction we have sustained the plaintiffs and it is not clear to us that any error was committed by the court in affirming as qualified above.

"(6.) The court erred in answering the defendant's sixth request for finding of fact, which request and answer are as follows:

" 'The aggregate ratings of all mines of all regoins combined, with the exception of the Allegheny Region, were during the period of the action, as follows:

1902	(April 1 to December 31)	1,574,796
1903		1,818,202
1904		2,016,898
	Total	**5,409,896**

520 " 'The mines to (in) the Allegheny Region were not supplied by cars moving or passing through Altoona, but with cars that came from the West. The mines in all other regions were supplied from cars which passed through Altoona, and were subject to the distribution directed from the general superintendent's office at that place.'

" 'Affirmed, although not believed to be material or relevant to the issue.'

"Said request should have been refused under all the testimony as not sufficiently proven and as irrelevant and immaterial to the issue trying."

Ruling: This exception is also overruled. On the theory of the case presented by the defendant it was material and relevant to the issue and was therefore admitted when offered for that purpose. On the theories, either of the plaintiff or of the court, it was of course not relevant or material. As we understand it, our treatment of it by affirmation and statement that it was not material or relevant to the issue is a proper one, so that in case of review by a higher court and argument by counsel on the facts such testimony could be considered.

"(7.) The court erred in answer to the defendant's thirteenth request for finding of fact, which request and answer thereto are as follows:

" 'The plaintiff in the case of coal sold by it to purchasers f. o. b. the cars at the mines consigned the coal so sold to the purchaser at the point at which the latter desired delivery thereof to be made. Of the plaintiff's total tonnage shipped in cars delivered to it by defendant, 88,808 tons were shipped in cars consigned to points within the State of Pennsylvania, and 407,413 tons to points without the State of Pennsylvania. The total tonnage so shipped and the division thereof as between points of consignment within and without the State of Pennsylvania was as follows:

521

1902.	Tonnage billed for consignee to Pennsylvania points.	Tonnage bill(ed) for consignee to points outside Pennsylvania.
April	1071	16753
May	2429	18115
June	2862	14638
July	2384	15783
Aug.	2500	15711
Sept.	2067	17392
Oct.	2776	15111
Nov.	1885	13353
Dec.	2585	11699
1903.		
Jan.	2982	10769
Feb.	1239	11045
March	2506	16800

April	1851	17197
May	3272	12200
June	3504	15097
July	2841	14609
Aug.	1838	14297
Sept.	3967	11115
Oct.	1918	13838
Nov.	2159	13663
Dec.	2625	12753
1904.		
Jan.	3132	7173
Feb.	3127	8862
March	3966	10480
April	4140	8397
May	1806	8305
June	3299	7260
July	2634	5486
Aug.	3452	9242
Sept.	3257	110435
Oct.	3232	8717
Nov.	2687	13428
Dec.	2609	7510'

"'Affirmed.'

"Said point should have been refused as immaterial. It throws no light upon the controversy here. The point to which the coal was shipped and consigned after the plaintiff's dominion over it had ceased can have no effect upon the plaintiff's rights.
522 And for the further reason that in billing the coal after it was delivered f. o. b. cars at the mines, the plaintiff was merely acting as agent for the consignee."

Ruling: This exception is also overruled. It is true that on the theory on which the plaintiff asked for damages, as also on the different theory adopted by the court, the above facts and tables connected thereto were immaterial and irrelevant. On the theory advanced by the defendant, in case of any damages being allowed, the facts in said point were material, for which reason they were affirmed, so that the said defendants could have the benefit of that as a finding of fact in case the Appellate Court took a different view of the law.

"(8). The court erred in its answer to defendant's eighteenth request for a finding of fact, which request and answer thereto are as follows:

"'By an oral agreement between the Lovell Coal Mining Company and the plaintiff the latter was obliged to pay to the former an amount equal to one-half of the selling price of the output of its mines No. 3 and 5, after first deducting the expenses of mining, royalties due to the owner of the coal, and the cost of supplies. This obligation continued in force until the sale of its rights in said mines to William A. Price, of Altoona, Pennsylvania, thereafter the plain-

tiff company, by virtue of agreements in writing with said Price of July 14th, 1903 and April 1st, 1904, bound itself to make payments to the said Price similar to those which it had previously been under obligation to make to the Lovell Coal Mining Company.'

"'Affirmed, as a correct statement of the contract mentioned. It could be refused, however, as being wholly immaterial and irrelevant to the issue. This part of the contract we do not believe even affects the price per ton to which the plaintiff may be entitled on coal which it failed to ship by reason of the discriminatory acts of the defendant.'

"Said request should have been refused as immaterial and having no bearing upon the issue in this case."

523 This exception is also overruled. It embodies one of the contentions of the defendant and for that reason was entitled to be affirmed, although regarded and treated by the court on the theory on which the case was decided as immaterial and irrelevant.

"Exceptions of the defendant to the findings of fact and of law and opinion of the court, filed December 29th, 1911, and to the verdict directed to be entered in favor of the plaintiff.

"The Pennsylvania Railroad Company, the defendant in the above entitled action, excepts to the findings of fact and of law and to the opinion and verdict directed to be entered thereon in the following particulars:—

"1. The court erred in affirming the twelfth request of the plaintiff for findings of fact, which said request was as follows:

"'(12.) That it is shown by the testimony in this case, evidenced by telegraphic orders emanating from the officers in charge of the operation of the defendant company, that beginning in the Summer or Fall of 1902, a series of special orders for special consignments of cars to the Berwind-White Coal Mining Company was issued and executed by the officers and train crews of the defendant company, unless prevented by occasional accidents, giving the Berwind-White Coal Mining Company a preference in the distribution of cars on the defendant company's lines for use in the coal trade on the South Fork and Scalp Level Division which orders intended to give and did give to the Berwind-White Coal Mining Company a preference in the distribution of said cars up to 500 cars per day with direction also to withdraw from 150 to 250 cars daily from the general supply to be held over each evening in readiness for the use of the Berwind-White Coal Mining Company on the following day, and that said orders were never rescinded during the period covered by this action.'"

524 Ruling: In argument the learned counsel for defendant contended that the court by affirming this request would leave the inference that the Berwind-White Coal Mining Company did get 500 cars regularly per day, whereas in truth and in fact there was no evidence to sustain a finding that they did get that number of cars each day absolutely. This contention is probably true, but as understood both by the court and counsel on both sides at the trial the orders for that number of cars were carried out, if possible, by the employees of the defendant and relatively that number of cars

ere received by the Berwind-White Coal Mining Company during he period of the action. As appears in the tenth request of de-endant for findings of fact of cars placed for Berwind-White Coal lining Company therein the actual number of cars furnished by the efendant company to the Berwind-White Coal Mining Company is ccurately set out and of course does not sustain the contention that ully 500 cars per day were placed by the defendant company to the Berwind-White Coal Mining Company. With this explanation as o what was intended by our affirmance of the request the exception s overruled.

"2. The court erred in affirming the thirteenth request of the laintiff for findings of fact, which said request was as follows:—

" '(13.) That in pursuance of said orders and special assignments, he defendant company did in the distribution of its cars, distribute aid 500 cars or whatever proportion thereof was on its lines above its ecessities for fuel coal to said Berwind-White Coal Mining Com-any before any cars were delivered to the plaintiff company.' "

"3. The court erred in affirming the sixteenth request of the laintiff for findings of fact, which said request was as follows:—

" '(16.) That by reason of the facts found in the foregoing paragraphs, the delivery of cars by the defendant to the plaintiff company was irregular and uncertain. That during a portion of the time the mines of plaintiff were idle from one to hree or more successive days at a time, and a portion of plaintiff's nines were idle as much as ten days per month in which no cars were delivered or insufficient cars to enable the mines to operate.' "

Ruling: This exception is also overruled.

"4. The court erred in affirming the seventeenth request of the laintiff for findings of fact, which said request was as follows:—

" '(17.) That as a mixed question of law and fact, the acts of the defendant above recited constituted an undue and unlawful discrimination against the plaintiff company and in favor of the Berwind-White Coal Mining Company.' "

Ruling: This exception is also overruled.

"5. The court erred in affirming the nineteenth request of the plaintiff for findings of fact, which said request was as follows:—

" '(19.) That the state of the coal market and the business of the plaintiff company were such as to enable the plaintiff to have sold during the period covered by this action substantially the capacity of its mines.' "

Ruling: This exception is also overruled.

"6. The court erred in refusing to affirm, without qualification, the first request of the defendant for findings of fact, such request and the answer thereto being as follows:

" '1. Subsequent to the institution of this action, James S. Whitely, Charles H. Brown and George E. Scott, the only stockholders of the Puritan Company at the time of the commencement of the action and during the period embraced therein, sold their stock in the Puritan Coal Mining Company, reserving to themselves individually the claim covered by the present action. By the terms

of the sale it was stipulated that for the purpose of the prose-
526 cution of the present action the said Brown, Whitely and Scott were to have access to the books and papers of the plaintiff company, and the right to make use of the same and to have the right to continue the prosecution of the pending action in the name of the Puritan Coal Mining Company, and to the use of all the rights and remedies of that company for such purpose, subject to the right of the purchaser of the stock, should he so elect, to have the claim assigned to the said Brown, Whitely and Scott, coupled with the right to the use of the name of the Puritan Coal Mining Company to the use of said Brown, Whitely and Scott in the present action. It was a further condition of said sale that if the claim were settled and payment made to the Puritan Coal Mining Company or its successors, the proceeds were to be turned over to said Brown, Whitely and Scott, who were to have entire control of any adjustment or settlement of the said claim or of the present action.'

"Answer: 'Affirmed, as a general statement of the letter contract by which James S. Whitely, Charles H. Brown and George E. Scott, stockholders of the Puritan Company, sold their stock to John C. Martin. The contract, as we construe it, does not amount to an assignment of the claim against the defendant company, but was a method of fixing in the former stockholders an alternative price for their stock, increased or to be increased by the amount of recovery against the defendant company in the suit then brought.' "

Ruling: This exception is also overruled.

"7. The court erred in refusing to find as requested in the seventh request of the defendant for findings of fact, such request and the answer of the court thereto being as follows:—

" '7. The defendant had in force during the period of the action rules or regulations which, by their terms, provided for a pro rata distribution of cars at all mines which were on its distribution sheets, the pro rata of each mine being ascertained with reference to
527 the percentage which its rating bore to the ratings of all mines. During this period, however, special orders for cars were frequently issued, which provided for the delivery of cars to certain operators irrespective of the consideration whether they would or would not have been entitled to such cars under the regularly prescribed method of distribution. These special orders were carried out through and under the supervision of the general superintendent at Altoona. The cars delivered thereunder were first deducted from those available for distribution on any day, and the remaining cars were allotted among the coal operators in the various regions.'

"Answer: 'This request cannot be affirmed under the testimony. It is true that the defendant had in force regulations providing generally for a pro rata distribution of cars to the various regions into which their bituminous coal territory was divided. It is also true that special orders for cars were issued, but it is not shown in testimony, except by inference, that any other general special orders were issued favoring any other company than the Berwind-White

Coal Mining Company. The special orders given favoring the Berwind-White Coal Mining Company so far as the evidence shows, were existent throughout the period of the action. The testimony, however, does not show that after deducting the cars delivered under special orders there was a general allotment to the coal operators of the various regions. The diversion of cars for distribution on any day to the Berwind-White Coal Mining Company on special orders, according to a number of telegrams, affected the distribution of cars only so far as two divisions, namely, the Mountain and South Fork and Scalp Level Divisions, are concerned. If the defendant wanted to establish any other theory of allotment to the various regions as claimed in this point, it had it in its power to do so by testimony. The testimony, as we understand it, clearly shows that whatever diversion or departure from equitable distribution of cars to the preferred shipper was from the Mountain Division
528 alone, and this is clearly evidenced by the telegrams offered by the plaintiff.'"

Ruling: This exception is also overruled.

"8. The court erred in refusing to find as requested in the eighth request of the defendant for findings of fact, such request and the answer of the court thereto being as follows:

"'8. Assuming that the plaintiff did not during the period of the action receive the benefit of any special orders, the number of cars which the plaintiff received during the period of the action was diminished to the extent to which cars were delivered under special assignments in the distribution of which it would otherwise have shared or participated. As any cars deducted from the general allotment or distribution and delivered under special orders would otherwise have gone into the general distribution, the plaintiff, as the result of the deliveries of cars under special orders, was not deprived of the aggregate of such deliveries, but only of its proportionate share thereof.'

"Answer: 'Refused as a whole, for the reasons as given in the refusal of No. 7. The point is predicated on the theory that the cars granted to the preferred shipper on the special orders, were drawn from the general distribution, whereas the evidence of the telegrams is convincing that such preference in cars was to the injury of the Mountain Division alone.'"

Ruling: This exception is also overruled.

"9. The court erred in refusing to find as requested in the ninth request of the defendant for findings of fact, such request and the answer of the court thereto being as follows:

"'9. The plaintiff's aggregate ratings in cars, taking the period of the action as a whole, was 47,476. The aggregate ratings of the mines in the regions among which any cars delivered under
529 special orders would otherwise have been distributed, amounted to 5,409,896 cars. Under a pro rata distribution the plaintiff would, therefore, have been entitled to less than nine-tenths of one per cent. of any cars delivered under special orders to other operators which were in excess of their pro rata allotment.'

"Answer: 'Refused. The plaintiff's claim, and the testimony to

sustain it, tend to clearly show a preference in car distribution affecting the Mountain Division alone. If it did not do so, it was in the power of the defendant company to present the facts on which to base this point.'"

Ruling: This exception is also overruled.

"10. The court erred in refusing to find as requested in the tenth request of the defendant for findings of fact, such request and answer of the court thereto being as follows:

"'10. Special orders relative to the delivery of cars at the mines of the Berwind-White Coal Mining Company, which were located in the "South Fork" or "Scalp Level" Region, were issued from time to time during the period of the action, directing the delivery to that company, with some variations, of the equivalent of 500 cars per day, counting a steel car as two cars. The aggregate number of cars delivered in the period of the action under these orders was as follows, counting a steel car as equal to two cars.

Year and month.	Total cars placed.
1902.	
April	11263
May	12373
June	11912
July	11278
August	11297
September	10866
October	10711
November	9388
December	8270

1903.	
January	6758
February	8666
March	9651
April	9628
May	8693
June	8847
July	8228
August	3427
September	7946
October	7558
November	8111
December	8466
1904.	
January	7737
February	7535
March	9169
April	9956
May	9729
June	8580
July	8645

August	7964
September	7947
October	8763
November	7640
December	7360
Total	299509

"'Of the cars delivered as above, 73,853 were the individual or private cars of the Berwind-White Coal Mining Company. The number of cars which the Berwind-White Coal Mining Company would have received had it received its pro rata distribution unaffected by special orders cannot be ascertained or computed from any evidence presented in the case.'

"Answer: 'That portion of the point, exclusive of the last sentence, is affirmed. The last sentence is refused as immaterial to the issue, for the reason that the distribution sheets offered in evidence do furnish the data on which the discrimination as against the Mountain Division can be fully ascertained.'"

531 Ruling: This exception is overruled. This request embodies one of the contentions of the defendant's counsel at trial, that is, that there was no evidence in the case to show the number of cars to which the Berwind-White Coal Mining Company were entitled on a fair pro rata distribution unaffected by the special orders. The facts embodied in the point were intended to sustain the defendant's theory of the case, which theory, however, was not sustained by the court. The defendant's theory of the case would, of course, have involved the finding as a fact that portion of the request which was refused. On the theory, however, upon which the court based its findings for damages it was immaterial what excess of cars were given Berwind-White Coal Mining Company over its pro rata share. The refusal of that portion of the request was therefore a proper one.

"11. The court erred in refusing to find, as requested in the fifteenth request of the defendant for findings of fact, such request and the answer of the court thereto being as follows:

"'15. It was the practice of the plaintiff to contract for the sale and delivery of its coal under contracts running for the "so-called" coal year, that is, from April 1st, to April 1st, in each year. It had entered into such contracts for the years beginning April 1st, 1902, April 1st, 1903, and April 1st, 1904. By the terms of these contracts, the plaintiff was excused from making deliveries thereunder in the event that it was unable to secure cars for the transportation of the coal. In each of the years the plaintiff failed to make deliveries of the total amount of tonnage covered by these contracts.

"'In the year beginning April 1st, 1902, the aggregate amount which it had failed to deliver under its contracts was 44,568 tons. In 1903 it was 40,244 tons, and in 1904 it was 68,254 tons. The

532 average price which the plaintiff would have realized on the 44,568 tons of coal in 1902 which was not delivered under its contracts was $1.55 per ton; the average price in 1903,

which it would have received would have been $1.76 per ton; and in 1904 it would have been $1.31 per ton.'

"Answer: 'This point cannot be affirmed as a whole. In the table of contracts for the sale of coal obtained from George E. Scott, there is an apparent shortage in delivery, but as explained by Mr. Scott in the same connection there was a substantial compliance with the majority of the contracts. The contracts themselves show that they were for an amount approximating the fixed sum, and Mr. Scott testified that all of them had been filled to the satisfaction of their customers. The total shortage for each year, as claimed in the second paragraph of this point, we assume, is made up from the tables of the contracts offered in evidence by the defendant, including the Baker-Whitely Company contract and the Lovell Coal Company contract and may be substantially correct as to the amount, considering them, without at the same time considering the effect of Mr. Scott's testimony as to the substantial compliance of their general contracts. The request as we look at it, affects only the question of the price per ton in estimating damages and in the calculation made by the court we have taken the unfilled contracts into consideration in making such estimate.' "

Ruling: This exception is overruled.

"12. The court erred in refusing to find as requested, in the sixteenth request of the defendant for Findings of Fact, such request and the answer of the court thereto being as follows:—

" '16. By the terms of the lease, under which the plaintiff operated its No. 3 mine, it was required to deliver to the lessor under said lease, viz., the Lovell Coal Mining Company, 24,000 gross tons of coal in equal monthly installments, with the privilege to the said lessor of requiring the delivery of an additional 26,000 tons in equal monthly installments, and, in addition thereto, one-half of
533 any tonnage mined by the plaintiff company in excess of the 100,000 tons per year.

" 'The price which the plaintiff was to receive for all coal delivered to its lessor, pursuant to the terms of said lease, was 70 cents per gross ton, which was to be increased or diminished to the same extent that the cost of mining such coal was increased or diminished by a change in the cost of mining or labor.

" 'This lease remained effective from April 1st, 1902, until July 1st, 1903. In this period the number of tons delivered by the plaintiff company to the Lovell Coal Mining Company was as follows:—

Year and month. 1902.	Tons.
April	1839
May	2150
June	2037
July	2164
August	1766
September	1847
October	1320
November	1044
December	822

1903.	
January	1192
February	843
March	1261
April	2412
May	2006
June	1399'

"Answer: 'This point is affirmed as substantially a correct statement of the contract between the plaintiff company and the Lovell Coal Mining Company. It could be refused, however, as being immaterial and irrelevant to the issue that is being tried. The relative rights of the plaintiff and the Lovell Coal Mining Company cannot be adjudicated in this action. The obligations of the plaintiff to said company, as to whether or not it performed its contract with the Lovell Coal Mining Company, cannot excuse the performance
534 by the defendant of its duty to the plaintiff company. Moreover there is no testimony or evidence in the case to show that the Lovell Coal Mining Company required the plaintiff company to make deliveries of a greater quantity of coal than it did make. The facts set forth in the point, therefore, as well as all other facts in the case relating to unfilled contracts, are only considered by the court with reference to their influence on the price per ton for the coal which plaintiff company alleges it could have mined, and did not by reason of the discrimination practiced against it by the defendant company.' "

Ruling: This exception is overruled.

Assignment of Error No. 14.

["13. The court erred in refusing to find as requested in the eighteenth request of the defendant for Findings of Fact, such request and the answer of the court thereto being as follows:—

" '18. By an oral agreement between the Lovell Coal Mining Company and the plaintiff, the latter was obligated to pay to the former an amount equal to one-half of the selling price of the output of its Mines Nos. 3 and 5, after first deducting the expenses of mining, royalties due to the owner of the coal, and the cost of supplies. This obligation continued in force until the sale of its rights in said mines to William A. Price, of Altoona, Pennsylvania, thereafter the plaintiff company, by virtue of agreements in writing with said Price of July 14th, 1903, and April 1st, 1904, bound itself to make payments to the said Price similar to those which it had previously been under obligation to make to the Lovell Coal Mining Company.'

"Answer: 'Affirmed, as a correct statement of the contract mentioned. It could be refused, however, as being wholly immaterial and irrelevant to the issue. This part of the contract we do not believe even affects the price per ton to which the plaintiff may be entitled on coal which it failed to ship by reason of the discriminatory acts of the defendant.' "

Ruling: This exception is overruled.]

535 Assignment of Error No. 6.

["14. The court erred in affirming the sixth request of the plaintiff for findings of law, which was as follows:—

"'(6.) That shipments by the plaintiff of its product which were sold f. o. b. cars as the mines, upon which the freight was paid by the consignees and destination entirely controlled by the consignees, constituted intrastate business, and not interstate business as between the plaintiff and defendant.'"

Ruling: This exception is overruled.]

Assignment of Error No. 13.

["15. The court erred in affirming the seventh request of the plaintiff for findings of law, which was as follows:—

"'(7.) That the plaintiff is entitled to recover in this case the reasonably fair profit on the coal that it was prevented from mining and selling by reason of the undue and unlawful discrimination of the defendant, which profit would be the difference between the cost of production of the coal plus the royalty and the fair market value of the same.'"

Ruling: This exception is overruled.]

Assignment of Error No. 7.

["16. The court erred in affirming the eighth request of the plaintiff for findings — law, which was as follows:—

"'(8.) If by virtue of the undue and unreasonable discrimination practiced in this case the plaintiff suffered damage at the hands of the defendant, it is entitled to recover in this action on the amount of coal it could have sold and would have been able to ship delivered f. o. b. cars at mines, but for the said discrimination of the defendant.'"

Ruling: This exception is overruled.]

Assignment of Error No. 16.

["17. The court erred in affirming the ninth request of the plaintiff for findings of law, which was as follows:—

"'(9.) The plaintiff is entitled to recover as compensation for delay, interest upon the damages as ascertained, such interest to be averaged.'"

Ruling: This exception is overruled.]

536 Assignment of Error No. 4.

["18. The court erred in refusing to find as requested in the defendant's first request for findings of law, which request was as follows:—

"'1. The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by

the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals.'"

Ruling: This exception is overruled.]

Assignment of Error No. 3.

["19. The court erred in refusing to find as requested in the defendant's second request for findings of law, which request and the answer of the court thereto are as follows:—

"'2. The plaintiff is not entitled to recover because the evidence has established that it has parted with its ownership of the claim which forms the basis of the action, is not now the owner thereof, and is not entitled to the proceeds of any recovery that may be had thereon.'"

"Answer: 'Refused. This point is based on the effect of a contract between the stockholders of the Puritan Coal Mining Company and John C. Martin, as shown in defendant's Exhibit No. 1. That contract does not justify a finding that the Puritan Coal Mining Company, acting as a corporation, either by its stockholders or directors, ever assigned or attempted to assign this claim. In fact there is no evidence of any corporate action on the subject. The contract is fairly construed as one by which the stock and property of the Puritan Coal Mining Company was vested in John C. Martin, the price for which without this claim against the railroad company was on a fixed basis for said stock. The Puritan Coal Mining Company as a corporate entity was preserved in its existence for the purpose of carrying on this case against the defendant company, then already brought, to its conclusion and the price of the stock of the said company was to be increased by whatever amount should
537 be recovered from the defendant corporation in this litigation. To our mind there is nothing illegal in such contract and nothing to destroy its validity or to destroy the claim as against the defendant corporation, being a valid and subsisting claim at the time of this contract.'"

Ruling: This exception is overruled.]

Assignment of Error No. 5.

["20. The court erred in refusing to find as requested in the defendant's third request for findings of law, which request was as follows:—

"'3. Under the law and the evidence the plaintiff is not entitled to recover.'"

Ruling: This exception is overruled.]

Assignment of Error No. 18.

["21. The court erred in refusing to find as requested in the defendant's fourth request for findings of law, which request and the answer of the court thereto are as follows:—

"'4. Any right of action that the plaintiff can assert is limited

to the loss, if any, which it sustained due to its inability to ship 64,587 tons of coal in the period of the action.' "

"Answer: 'Refused. This point is based on the fact that the plaintiff company, by its statement of claim first filed, claimed for loss in shipment of 64,587 tons of coal during the period of the action, and by its later statement filed a claim for a very much larger amount. The difference in these amounts arose, as explained by Mr. Scott in his testimony from the fact that he was advised by counsel after making his first statement that he had a right to include coal sold by his company f. o. b. cars at the mines, as well as coal actually shipped to points within the State. We have already passed upon this point in an opinion allowing the amendment. The cause of action in both statements is the same, namely, alleged discrimination in preferences extended to the Berwind-White Coal Mining Company. In our judgment, no change in the cause
538 of action, either in the statement or in the evidence offered to support the statement, can be claimed.' "

Ruling: This exception is overruled.]

Assignment of Error No. 8.

["22. The court erred in refusing to find as requested in the defendant's fifth request for findings of law, which request was as follows:—

" '5. Plaintiff's right of action, as defined and limited by its statement of claim, extends to and embraces only the loss, if any, which it sustained due to its being deprived, as the result of deliveries of cars made to the Berwind-White Coal Mining Company, of the number of cars which its rating and percentage based thereon entitled it to receive of the total number of cars distributed by the defendant, and which it would have received had the Berwind-White Coal Mining Company received only its pro rata of the cars distributed.' "

Ruling: The exception is overruled. This request of law embodied one of the contentions or theories advanced by the defendant and was refused because it was not sustained by the evidence, which clearly showed that the discrimination of the defendant company was as between the Scalp Level Division and the Mountain Division only.]

"23. The court erred in refusing to find as requested in the defendant's sixth request for findings of law, which request was as follows:

" '6. The burden is upon the plaintiff to establish the extent to which cars delivered to the Berwind-White Coal Mining Company affected or diminished the number which it, the plaintiff, would have received, as its pro rata of those distributed. It has not presented any evidence to show to what extent, if any, the cars delivered to the Berwind-White Coal Mining Company were in excess of that company's pro rata share of those distributed, and consequently no basis is afforded for ascertaining to what extent, if any, plaintiff's
539 pro rata share of the cars distributed was affected or diminished by the deliveries made to the Berwind-White Coal Min-

ing Company. The plaintiff, therefore, is not entitled to recover.' "

Ruling: This exception is overruled. The request was refused because it embodied a theory of the defendant not sustained by the evidence.

Assignment of Error No. 9.

["24. The court erred in refusing to find as requested in the defendant's seventh request for findings of law, which request was as follows:

" '7. The extent of the excess, if any, in the number of cars delivered to the Berwind-White Coal Mining Company can only be ascertained by finding, in the first place, the number that company would have received had it received its pro rata share. Its pro rata share cannot be ascertained with reference to, nor be measured by, the number of cars which any shipper received. As the plaintiff has presented no evidence to show what the pro rata share of the Berwind-White Coal Mining Company would have been, no basis is presented for ascertaining or determining to what extent, if any, the cars delivered to the Berwind-White Company exceeded its pro rata share. The plaintiff, therefore, is not entitled to recover.' "

Ruling: This exception is overruled. The request was refused because made in pursuance of a theory of the defendant which was not sustained by the evidence.]

"25. The court erred in refusing to find as requested in the defendant's eighth request for findings of law, which request was as follows:

" '8. If there were evidence from which it could be ascertained that the cars delivered to the Berwind-White Coal Mining Company were in excess of its pro rata share, and the extent of such excess could be shown, the share or proportion of such excess cars which the plaintiff can properly claim should have been delivered to it would be such number as would bear the same relation to the
540 whole number of excess cars as the ratings of the plaintiff's mines bore to the ratings of the mines in all regions affected by the withdrawal of such excess cars from the general distribution. The plaintiff would consequently have been entitled to less than nine-tenths of one per cent. of these cars.' "

Ruling: This exception is overruled. The request was based upon a theory of the law contended for by the defendant's counsel which disregarded the facts proven in the case.

"26. The court erred in refusing to find as requested in the defendant's tenth request for findings of law, which request was as follows:

" '10. In determining whether the plaintiff was discriminated against because of deliveries of cars made to the Berwind-White Coal Mining Company only those cars can be considered which were availed of by that company and by the plaintiff, respectively, for their intrastate shipments or business. Cars delivered by the defendant and used with its consent for interstate shipments must necessarily be excluded from consideration in determining whether the defendant had been guilty of any discrimination prohibited by

the statutes of the State of Pennsylvania, for these statutes have no relation to, nor do they have any application to the distribution of cars by the defendant which are used for shipments of coal to points without the State of Pennsylvania.' "

Ruling: This exception is overruled, for reasons given in the discussion of law and fact in the general opinion filed.

Assignment of Error No. 10.

["27. The court erred in refusing to find as requested in the defendant's eleventh request for findings of fact, which request was as follows:

" '11. As it appears from the evidence that the cars used by the plaintiff for its State shipments for deliveries of coal during
541 the period of the action constituted a greater percentage of its mine rating than did the cars so used by the Berwind-White Company, the defendant has not been shown by the evidence to have been guilty of any unlawful discrimination cognizable in this action.' "

Ruling: This exception is overruled.]

"28. The court erred in finding that the evidence had established the following facts:—

" 'That beginning in the Summer of 1902 the defendant Company by virtue of telegraphic orders issued from the general officers in charge of the operation of the defendant company and carried out by the officers and train crews of the said company, gave to Berwind-White Coal Mining Company a preference in the distribution of cars on the defendant company's line, for use in the coal trade, over the mines of the Mountain Division, and this preference, both directly and indirectly, affected the distribution of cars to the plaintiff company. These telegraphic orders for preference, as shown by the testimony, begin June 28th, 1902, from Superintendent Wallis, of said company, located at Altoona, to subordinate officers, and direct that a preference up to five hundred cars daily shall be given out of all cars to the mines of the Berwind-White Coal Mining Company at Scalp Level, and in addition thereto that from one hundred to two hundred and fifty cars be kept standing over each night so that the mines at Scalp Level shall be served early in the morning.' (See fifth finding of fact.)"

Ruling: This exception is overruled.

"29. The court erred in finding that the evidence had established the following facts:—

" 'That as a result of the preferences given to the said Berwind-White Coal Mining Company, in the Scalp Level region on the South Fork and Scalp Level Division of the said defendant company's railway, the mines of the plaintiff company, situate on the Mountain Division of said railway, were seriously hampered in their mining operations, in that they did not receive their full quota of cars according to their distributive rating, were many days
542 without cars and cars when distributed were not distributed at such a time as that they could be loaded for that day,

	Steel Cars required to make equal with Scalp Level.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalise with Scalp Level.	Long in Other Cars.	Sh... in ... as...
1902						
April	3106.5	2074.5	4149	2548	1207	
May	3424.5	2277.5	4555	2745	1084	
June	3212	1980	3960	3024	1038	
July	3187.5	1936.5	3873	3074	1545	
Aug	3161	1620	3240	3085	703	
Sept	2787.5	1493.5	2987	3099	627	
Oct	2579.5	1353.5	2707	2705	429	
Nov	2467	1327	2654	2058.5	599.5	
Dec	1989.5	1191.5	2383	2081.5	642.5	
1903						
Jan	1892	1102	2204	1995	464	
Feb	2168	1205	2410	1586	91	
Mar	2921	951	1902	2337.5	713.5	
Apr	2364	976	1952	2025.5	62.5	
May	2009.5	1005.5	2011	2089.5	734.5	
June	2191	853	1706	1933.5	750.5	
July	2192.5	828.5	1657	1713	766	
Aug	2357.5	768.5	1537	1250	625	
Sept	2170.5	812.5	1625	1310.5	690.5	
Oct	1783	925	1850	1565.5	861.5	
Nov	2044.5	1031.5	2063	1440	676	
Dec	2181	1132	2264	2069.5	743.5	
1904						
Jan	1963	1206	2412	1345	710	
Feb	2045.5	858.5	1717	1301	907	
Mar	2237.5	1149.5	2299	2012.5	1022.5	
Apr	2643	1636	3272	1536.5	612.5	
May	2600	1331	2662	1649	122	
June	2056.5	1129.5	2259	1217	383	
July	2044.5	1268.5	2537	1351	851	
Aug	1608.5	807.5	1615	1847.5	230.5	
Sept	1449	703	1406	1901	115	
Oct	1866	1198	2396	1771	437	
Nov	1577	828	1856	1648.5	202.5	
Dec	1314.5	835.5	1671	1534.5	X(56.5)	
	75604.5	39895.5	79791	64850	20344.5	5

X Is short.

Cars ired ake with Level.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalize with Scalp Level.	Long in Other Cars.	Net Shortage in cars (Steel as two).	Net Shortage in tons (Car 25 tons).	Puritan Distribution percentage for month as fixed by Deft.	Shortage in Puritan tonnage on acct. of car shortage.	Average selling price per ton	Cost of production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss Penna. Delivery	Total Loss Interstate Delivery.
06.5	2074.5	4149	2548	1207	2942	73550	8.2	6031.1	1.17	1.10	.07	422.18	78.23	21.77	330.27	91.91
24.5	2277.5	4555	2745	1084	3471	86775	8.1	7028.7	1.30	1.10	.20	1405.74	75.21	24.79	1057.26	348.48
12	1980	3960	3024	1038	2922	73050	8.1	5917.4	1.86	1.10	.76	4497.22	80.25	19.75	3609.02	888.20
87.5	1936.5	3873	3074	1545	2328	58200	8.1	4714.2	1.72	1.10	.62	3062.80	85.14	14.86	2607.67	455.13
61	1620	3240	3085	703	2537	63425	8.1	5137.4	1.47	1.10	.37	1900.84	88.86	11.14	1689.09	211.75
87.5	1493.5	2987	3099	627	2360	59000	7.8	4602	1.69	1.10	.59	2715.18	81.88	18.12	2223.19	491.99
79.5	1353.5	2707	2705	429	2278	56950	7.8	4442.1	2.54	1.10	1.44	6396.62	86.79	13.21	5551.63	844.99
67	1327	2654	2058.5	599.5	2054.5	51362.5	7.6	3903.5	2.28	1.10	1.18	4606.13	86.93	13.07	4004.11	602.02
89.5	1191.5	2383	2081.5	642.5	1740.5	43512.5	9.5	4133.6	2.80	1.10	1.70	7027.12	91.05	8.95	6398.19	628.93
92	1102	2204	1995	464	1740	43500	9.7	4219.5	3.22	1.10	2.12	8945.34	92.27	7.73	8253.96	691.38
68	1205	2410	1586	91	2319	57975	9.6	5565.6	2.09	1.10	.99	5509.94	88.46	11.54	4874.09	635.85
21	951	1902	2337.5	713.5	1188.5	29712.5	9.5	2822.6	1.59	1.10	.49	1383.07	87.95	12.05	1216.41	166.66
64	976	1952	2025.5	62.5	1889.5	47237.5	9.7	4582	1.57	1.15	.42	1924.44	91.98	8.11	1768.37	156.07
09.5	1005.5	2011	2089.5	734.5	1276.5	31912.5	8.5	2712.5	1.52	1.15	.37	1003.63	94.97	5.13	952.14	51.49
91	853	1706	1933.5	750.5	955.5	23887.5	8.5	2030.4	1.53	1.15	.38	771.55	90.64	9.36	699.33	72.22
92.5	828.5	1657	1713	766	891	22275	8.5	1893.3	1.55	1.15	.40	757.32	96.39	3.61	729.98	27.34
57.5	768.5	1537	1250	625	912	22800	8.5	1938.0	1.50	1.15	.35	678.30	87.73	12.27	595.07	83.23
70.5	812.5	1625	1310.5	690.5	934.5	23362.5	6.0	1401.7	1.50	1.15	.35	490.60	86.86	13.14	426.14	64.46
83	925	1850	1565.5	861.5	988.5	24712.5	5.7	1408.6	1.46	1.15	.31	436.67	85.90	14.10	375.10	61.57
44.5	1031.5	2063	1440	676	1387	34675	6.0	2080.5	1.48	1.15	.33	686.57	90.06	9.94	618.33	68.24
81	1132	2264	2069.5	743.5	1520.5	38012.5	6.0	2280.7	1.44	1.15	.29	661.40	93.97	6.03	621.52	39.88
963	1206	2412	1345	710	1702	42550	6.0	2553	1.43	1.15	.28	714.84	87.67	12.33	626.70	88.14
045.5	858.5	1717	1301	907	810	20250	6.0	1215	1.41	1.15	.26	315.90	73.88	26.12	233.39	82.51
237.5	1149.5	2299	2012.5	1022.5	1276.5	31912.5	6.0	1914.7	1.43	1.15	.28	536.12	81.15	18.85	435.05	101.06
643	1636	3272	1536.5	612.5	2659.5	66487.5	6.0	3989.2	1.31	1.15	.16	638.27	83.94	16.06	535.76	102.51
600	1331	2662	1649	122	2540	63500	6.9	3746.5	.....	.....	.....	.....	81.79	18.21		
056.5	1129.5	2259	1217	383	1876	46900	6.9	2777.1	.....	.....	.....	.....	93.89	6.11		
044.5	1268.5	2537	1351	851	1986	49650	5.6	2780.4	.....	.....	.....	.....	95.93	4.07		
608.5	807.5	1615	1847.5	230.5	1384.5	34612.5	5.6	1938.3	.....	.....	.....	.....	88.46	11.54		
449	703	1406	1901	115	1293	32325	5.6	1810.2	1.23	1.12	.11	199.12	80.95	19.05	161.19	37.93
866	1198	2396	1771	437	1959	48975	5.6	2742.6	1.23	1.12	.11	301.68	90.59	9.49	273.06	28.63
577	828	1856	1648.5	202.5	1653.5	41337.5	5.6	2314.9	1.23	1.12	.11	254.64	73.72	26.28	187.72	66.92
314.5	835.5	1671	1534.5	X(56.5)	1727.5	43187.5	5.6	2418.5	1.23	1.12	.11	266.04	80.48	19.52	204.11	51.93
5604.5	39895.5	79791	64850	20344.5	59503.0	1487573.0	.....	109045.4	.....	.....	.....	58509.27	.....	.....	51257.85	7251.42

(To face page 165.)

whereby also their miners became scattered and disaffected and their cost of mining was largely increased.' (See seventh finding of fact.)"

Ruling: This exception is overruled.

Assignment of Error No. 15.

["30. The court erred in finding that the evidence had established the following facts:—

" 'That the evidence shows that the fair average cost of producing coal at the plaintiff's mines during the period of the action, including royalty, had they been treated by the defendant company with a fair distribution of cars, was $1.10 per ton from April, 1902, to March, 1903, inclusive, and $1.15 per ton from April, 1903, to March, 1904, inclusive, and $1.12 per ton for the period of the action thereafter.' (See thirteenth finding of fact.)"

Ruling: This exception is overruled.]

"31. The court erred in adopting as the basis for estimating the damages which the plaintiff was entitled to recover the following as the average prices which the plaintiff would have realized on any additional coal which it could have shipped:

'1902.	
April	1.17
May	1.30
June	1.86
July	1.72
August	1.47
September	1.69
October	2.54
November	2.28
December	2.80
1903.	
January	3.22
February	2.09
March	1.59
April	1.57
May	1.52
June	1.53
July	1.55
August	1.50
September	1.50
October	1.46
November	1.48
December	1.44

(Here follow tables marked pages 543 and 544.)

545

1904.	
January	1.43
February	1.41
March	1.43
April	1.31
May	....
June	....
July	....
August	....
September	1.23
October	1.23
November	1.23
December	1.23'

(See Fourteenth Finding of Fact.)"
Ruling: This exception is overruled.

Assignment of Error No. 11.

["32. The court erred in estimating the damages to which it found the plaintiff to be entitled in accordance with the schedule which is embodied in its fifteenth finding of facts, and which was as follows:

546 Ruling: This exception is overruled.]

Assignment of Error No 12.

["33. The court erred in failing to take into account the private or individual cars, so-called, which were delivered to the plaintiff during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the court has found should have been allotted to the region or district in which the plaintiff's mines were located."
Ruling: This exception raises a question not before considered by the court and never suggested by counsel. The method by which the court calculated the damages of the plaintiff left out of consideration the individual cars placed in both the Mountain Division and the Scalp Level Division. This method was adopted by the court for the reason that individual cars were not charged against owners in making distribution until 1906, as shown by the testimony of Mr. Trump, on pages 200 and 201. This date was long after the period of the action. The defendant company, therefore, as a matter of law and morals should be bound by the position it made for itself and should be estopped from repudiating the rule it enforced, even if later it is found that such rule was technically wrong. This, for the principle that no suitor may come into court and assert a principle or maintain a position that would enable it to profit by its own wrong. Prior to and at the trial of the case the

defendant never presented a claim that individual cars should be taken into consideration and never before these exceptions were filed made any claim that by excluding individual cars a different amount of damage would be ascertained. Without great labor at this time we are wholly unable to determine whether the amount of damages found by the court would be changed by taking into consideration ind-vidual cars. The theory, however, on which the railroad acted in distributing cars to its patrons by excluding or not charging against such patrons the individual cars placed, during the period of the action, is we believe the true measure of damages as
547 set out in the schedule adopted by the court. The defendant company should be estopped from claiming any other measure, even if in its favor, on the same principle or feature of the doctrine of estoppel expressed in Railway Co. vs. McCarthy, 96 U. S., 258-268. In that case Justice Swayne says, "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." To the same effect is Ice Co. vs. Improvement Co., 232 Pa. St., 293-300. Moreover to adopt any other theory after the fact and policy of the method of distribution followed by the defendant would work a manifest hardship against a shipper suing for damages who had no individual cars. This is especially true, if the method of calculating and scheduling damages adopted by the court is the correct theory in this case, because the Mountain Division did have a certain proportion of individual cars just as did the Scalp Level Division. But if some unfortunate individual shipper of the Mountain Division had no private or individual cars during the period of his action, he would be charged with his proportion of individual cars placed in his division, manifestly to his injury, on the theory of damages adopted by the court. This of itself proves its falsity. Moreover it is apparent from the tables obtained from the distribution sheets that the individual cars of the Mountain Division were less than those of the South Fork and Scalp Level Division, the former being 67,395 and the latter 81,031. Of what avail then would be the present claim of the defendant that the method adopted by the court was not the true method? Again, the kind, character and size of the individual cars placed, either to the Mountain Division or to the South Fork and Scalp Level Division, were not scheduled in the case, for which reason alone no equitable basis of calculation could have been made by the
548 court. As shown in the testimony, the favored shipper, namely, Berwind-White Coal Mining Company, obtained from the defendant company as its own individual cars at least one thousand steel cars counted as two in our calculation, while the testimony also shows that whatever of individual cars the plaintiff company had were of a lesser capacity. Manifestly, therefore, the court could not have made and cannot now make from any data in the case an equitable schedule of damages on the theory now for the first time presented in this exception. That theory might have been

of some consequence had the court adopted the theories of damages claimed by the plaintiff, in which only the respective car supplies of the plaintiff company and the Berwind-White Coal Mining Company were considered. Not having adopted the plaintiff's theory of damages, the court is of the opinion that the defendant railroad company should be bound by its own course of conduct and method of distribution in dealing with both the individual cars of the plaintiff company as the party discriminated against and as to the Berwind-White Coal Mining Company, the favored shipper.

In connection with this exception defendant's counsel submitted a schedule of damages alleged to have been based on the court's theory of the case, which shows injury to the extent of $33,797.69, without damages in lieu of interest. The vice of this schedule is that it starts with the sixth column of the schedule adopted by the court, showing "net shortage in cars, steel as two." The results in the sixth column are obtained by comparison between the Mountain Division and the Scalp Level Division of all cars other than individual cars placed in both regions. No individual cars in either region enters into the equalization shown in the court's first column. The result of the defendant's schedule, therefore, is that the plaintiff company is charged with its proportion of individual cars twice, while the individual cars furnished to the favored shipper has never been considered in the calculation. This schedule it is presumed was intended to be attached and made a part of this exception and is so treated. From it

(Here follow tables marked pages 549 and 550.)

	Mountain Region's Net Shortage in cars as determined by Court.	Individual cars placed at mines in Mountain Region as determined by Court.	Aggregate of additional cars which Court has found Mountain Region should have received and of individual cars placed at mines in that Region.	Puritan distribution percentage for month as adopted by Court.	Proportion of aggregate excess cars and individual cars to which Puritan entitled based on its percentage.
1902					
April	2942	2331	5273	8.2	432
May	3471	2600	6071	8.1	491
June	2922	2252	5174	8.1	419
July	2328	2135	4463	8.1	361
Aug	2537	2021	4558	8.1	369
Sept	2360	2102	4462	7.8	348
Oct	2278	1915	4193	7.8	327
Nov	2054.5	1927	3981.5	7.6	302
Dec	1740.5	1723	3463.5	9.5	329
1903					
Jan	1740	1273	3013	9.7	292
Feb	2319	1434	3753	9.6	360
Mar	1188.5	2035	2223.5	9.5	306
Apr	1889.5	1856	3745.5	9.7	363
May	1276.5	1937	3213.5	8.5	273
June	955.5	2021	2976.5	8.5	253
July	891	1856	2747	8.5	233
Aug	912	2218	3130	8.5	266
Sept	934.5	2148	3082.5	6.0	184
Oct	988.5	2537	3525.5	5.7	200
Nov	1387	2374	3761	6.0	225
Dec	1520.5	2079	3599.5	6.0	215
1904					
Jan	1702	1537	3239	6.0	194
Feb	810	1943	2753	6.0	165
Mar	1276.5	2053	3329.5	6.0	199
Apr	2659.5	1980	4639.5	6.0	278
May	2540	1793	4333	6.9	298
June	1876	1863	3739	6.9	257
July	1986	2037	4023	5.6	225
Aug	1384.5	2195	3579.5	5.6	200
Sept	1293	1928	3221	5.6	180
Oct	1959	2547	4506	5.6	252
Nov	1653.5	2214	3867.5	5.6	216
Dec	1727.5	2528	4255.5	5.6	238
	59503.0	67392	126895.0	.....	9250

(*) This total includes only cars short. Cars over are not deducted. If "overs

(To face page

	Mountain Region's Net Shortage in cars as determined by Court.	Individual cars placed at mines in Mountain Region as determined by Court.	Aggregate of additional cars which Court has found Mountain Region should have received and of individual cars placed at mines in that Region.	Puritan distribution percentage for month as adopted by Court.	Proportion of aggregate excess cars and individual cars to which Puritan entitled based on its percentage.	Individual cars actually placed at Puritan Mines.	Number of additional cars Puritan should have received.	Shortage in Puritan tonnage. Car 25 tons.	Loss per ton as adopted by Court.	Total loss Puritan Company ascertained with reference to profit per ton found by Court, but with reference to shortage in tonnage ascertained with reference to individual cars placed at its Mines.	Percentage of loss on Penna. delivery as adopted by Court.	Total loss Penna. Delivery.
.....	2942	2331	5273	8.2	432	206	226	5650	.07	395.50	78.22	309.39
.....	3471	2600	6071	8.1	491	301	190	4750	.20	950.00	75.21	714.49
.....	2922	2252	5174	8.1	419	242	177	4425	.76	3363.00	80.25	2698.80
.....	2328	2135	4463	8.1	361	239	122	3050	.62	1891.00	84.14	1591.08
.....	2537	2021	4558	8.1	369	223	146	3650	.37	1350.50	88.86	1200.05
.....	2360	2102	4462	7.8	348	213	135	3375	.59	1991.25	81.88	1630.43
.....	2278	1915	4193	7.8	327	219	108	2700	1.44	3888.00	86.79	3374.39
.....	2054.5	1927	3981.5	7.6	302	288	14	350	1.18	413.00	86.93	359.02
.....	1740.5	1723	3463.5	9.5	329	222	107	2675	1.70	4547.50	91.05	4140.49
.....	1740	1273	3013	9.7	292	95	197	4925	2.12	10441.00	92.27	9633.91
.....	2319	1434	3753	9.6	360	130	230	5750	.99	5692.50	88.46	5035.58
.....	1188.5	2035	2223.5	9.5	306	230	76	1900	.49	931.00	87.95	818.81
.....	1889.5	1856	3745.5	9.7	363	254	109	2725	.42	1144.50	91.98	1052.71
.....	1276.5	1937	3213.5	8.5	273	266	7	175	.37	64.75	94.97	61.49
.....	955.5	2021	2976.5	8.5	253	244	9	225	.38	85.50	90.64	77.49
.....	891	1856	2747	8.5	233	282	(over) 49	.....	.40	.....	96.39	
.....	912	2218	3130	8.5	266	219	47	1175	.35	411.25	87.73	360.78
.....	934.5	2148	3082.5	6.0	184	240	(over) 56	.....	.35	.....	86.86	
.....	988.5	2537	3525.5	5.7	200	280	(over) 80	.....	.31	.....	85.90	
.....	1387	2374	3761	6.0	225	255	(over) 30	.....	.33	.....	90.06	
.....	1520.5	2079	3599.5	6.0	215	259	(over) 44	.....	.29	.....	93.97	
.....	1702	1537	3239	6.0	194	179	15	375	.28	102.20	87.67	89.59
.....	810	1943	2753	6.0	165	200	(over) 35	.....	.26	.....	73.88	
.....	1276.5	2053	3329.5	6.0	199	232	(over) 33	.....	.28	.....	81.15	
.....	2659.5	1980	4639.5	6.0	278	237	41	1025	.16	164.00	83.94	137.66
.....	2540	1793	4333	6.9	298	219	79	1975	.....	.....	81.79	
.....	1876	1863	3739	6.9	257	124	133	3325	.....	.....	93.89	
.....	1986	2037	4023	5.6	225	107	118	2950	.....	.....	95.93	
.....	1384.5	2195	3579.5	5.6	200	132	68	1700	.....	.....	88.46	
.....	1293	1928	3221	5.6	180	127	53	1325	.11	145.75	80.95	117.99
.....	1959	2547	4506	5.6	252	142	110	2750	.11	302.50	90.59	274.03
.....	1653.5	2214	3867.5	5.6	216	259	(over) 43	.....	.11	.....	73.72	
.....	1727.5	2528	4255.5	5.6	238	184	54	1350	.11	148.50	80.48	119.51
	59503.0	67392	126895.0	.....	9250	7049	(*) 2571	64275	.....	38423.20	.....	33797.69

(*) tal includes only cars short. Cars over are not deducted. If "overs" deducted net shortage would be 2201 cars.

(To face page .169)

551 thus attached the truth of the above objections can be readily ascertained. For the above reasons, therefore, this exception is hereby overruled.]

(Copy of schedule submitted with above exception.)

552 Assignment of Error No. 17.

["34. The court erred in including the damages which it found had been sustained by the plaintiff a sum equal to interest at 6% for seven and a half years as damages for delay."

Ruling: This exception raises the question of the allowance by the court of a specific sum as compensation for the delay in the payment of damages assessed. The allowance by the court of that sum is based upon the principle laid down in many decisions. In the syllabii to Rodgers vs. Citizens National Gas Co., 130 Pa. St., 37, it is held: "3. In actions for unliquidated damages, whether sounding in tort or contract, whenever the damages are to be assessed on the principle of compensation and with the reference to a definite standard such as market value, the jury may give additional damages in the nature of interest. 4. Such additional damages are not properly interest nor are they recoverable of right as interest is; they are simply compensation for delay measured by the rate of interest and their allowance depends upon the circumstances of each case and is to be determined by the jury." A number of cases prior thereto are cited by the learned court in support of that position. The same principle is affirmed in a recent case. Wayne vs. Pennsylvania Railroad Co., 231 Pa. St., 512. In Pierce vs. Lehigh Valley Coal Co., 232 Pa. St., 170, one of the latest utterances of the Supreme Court on the subject, is in a case where the allowance by the jury of a sum as compensation for delay was stricken off by the lower court and sustained by the higher court. The opinion of Mr. Justice Mestrezat states the principle underlying the whole subject. "The right to compensation for delay in the payment of damages arising out of a tort depends upon the circumstances of the case. It is, therefore, usually a question for the jury under the evidence submitted. If the fault of non-payment of the claim rests with the defendant, he cannot complain if he is required to compensate for the delay. If, on the other hand, the fault lies with the plaintiff by reason of an excessive and unconscionable demand, one
553 which the defendant is required to protect himself against by litigation, he should not be penalized for the unwarranted conduct of the plaintiff and required to pay damages for the delay in settlement of the claim."

Applying these principles to the case in hand, was the court justified, acting as he was as the jury in this case, in assessing 45% as compensation for the delay? The law, the facts and the justice of this case, as we believe, justify the allowance. To determine this a brief review of the case and the claim is necessary. The original præcipe, filed March 26th, 1908, claimed for damages not exceeding $75,000. Plaintiff's statement, filed November 21st, 1908, claimed the right to recover $49,936.07, with an additional amount to com-

pensate for delay. About the same time plaintiff brought suit in the Circuit Court of the United States, against the same defendant, claiming the right to recover $242,999.65, for the same alleged discrimination based on identically the same facts, claiming, however, to recover in that court because of the jurisdiction of said court over interstate commerce. On April 3d, 1911, plaintiff in this case was allowed to amend its præcipe by substituting a statement for damages to the amount of $300,000. instead of $75,000, and a declaration was filed in this court claiming the right to recover $260,777.96, on exactly the same alleged discriminatory acts as in the original statement. As appears in the testimony in this case, the larger claim by the later statement was based by plaintiff, by advice of counsel, upon their belief that the law gave plaintiff the right to recover in the jurisdiction of the State Courts, for coal sold f. o. b. cars at the mines as a Pennsylvania delivery without regard to the question of the ultimate destination of the coal. The question thereby raised was merely one of jurisdiction as to the proper court in which such damages could be recovered, and the theory of the plaintiff was sustained in the trial of the cause by this court. At the trial plaintiff contended the right to recover upwards of
554 $200,000, without any allowance of compensation for delay, and by their exceptions still persist in such claim, while the court took a different theory of the elements of damage based on car distribution to the Mountain Region, of which the plaintiff was a part, rather than, on a comparison between the plaintiff and the preferred shipper. The question involved therein is purely one of law so that, as we look at it, the claim of the plaintiff for a very much larger amount than that allowed by the court does not indicate that said claim was an excessive and unconscionable demand although considerable in excess of that allowed by the court. The amount allowed by the court as shown in the table is a carefully worked out calculation of the coal tonnage of which the plaintiff company was deprived from shipping by the discriminatory acts of the defendant. This coal tonnage is based on the net shortage of cars of which plaintiff was deprived by the defendant in discriminating in favor of the Berwind-White Coal Mining Company, and these cars, if we are right in our theory, the plaintiff was entitled to have placed for loading daily during the period of the action. If this theory of damages is correct, why is not plaintiff also entitled to the several sums, calculated monthly as in said table, from the actual time when it was so deprived? The sum of $51,257.85 represents the damages as of the date when those damages occurred, from seven to nine years prior to the calculation and determination of this suit. The court allowed compensation for delay for only seven and one-half years although over one-half of the $51,257.85 was incurred more than nine years prior to the determination of this suit. Moreover, there is no testimony in the case going to show that the plaintiff is at fault in claiming damages against the defendant company. The facts in the case disclose a rank case of discrimination against the verbal, written and telegraphic protests of the manager of the plaintiff company. The attorney for the plaintiff company, in a personal

interview with an officer of the defendant corporation, in
555 March, 1903, called attention to the discriminatory acts and demanded fair treatment, and impliedly at least called attention to the defendant's liability for such acts and was told by the officer of the defendant company that said company was going to take care of Berwind and run all chances in doing it. At the trial of the case no defense in the nature of a denial of the discriminatory acts, or even of the legal view that such acts were discrimination, was presented by defendant's counsel. Defendant company, therefore, must be considered as knowing that the plaintiff company had a bona fide claim against said company, although suit was not brought or evidence of formal demand made until in the Spring of 1908. No evidence was offered on either side to show that either plaintiff or defendant attempted to adjust this case out of court. The defendant has contended from start to finish of the case, so far as the evidence discloses, that there is absolutely no liability whatever, not because they deny or show by evidence that there was no discrimination but because of legal technicalities set up as a bar to the right of recovery. These they still maintain. The loss of profit per ton allowed by the court on the tonnage of which plaintiff was deprived was calculated with all of the elements favoring the defendant for which they could reasonably ask. Moreover, the amount as found by the court leaves out of view and calculation altogether the actual loss which the testimony would indicate the plaintiff suffered on the coal actually mined and shipped, amounting from five to ten cents per ton. If the testimony on that subject is to be believed, the plaintiff's mines were equipped for a very large tonnage, as much as 1,200 tons a day. By reason of the discrimination against them, in shortage of cars as well as by irregular car service, they were hampered and prevented from operating their mines so that even the coal which they were able to ship cost ten cents per ton more that it should have cost had they been allowed their proper pro rata in car distribution. This element of damages alone would
amount to more than the amount awarded by the court as
556 damages for delay. While not specifically claimed by plaintiff as an item of damages on their theory of the case, it could have been allowed under the general declaration of plaintiff as one of the elements going to make up its claim and distinctly growing out of the discrimination practiced.

Considering, therefore, all the facts and circumstances of this case as proven by the evidence, together also with the method of calculation by which the court fixed the damages at $51,257.85, we are of the opinion that we were clearly justified in adding 45% to that amount as compensation for the delay in paying it. The exception is therefore, overruled.]

Assignment of Error No. 19.

["35. The court erred in finding that the plaintiff had sustained damages exclusive of those resulting from delay to the amount of $5,257.85 ($51,257.85)."

Ruling This exception is overruled.]

Assignment of Error No. 20.

["36. The court erred in finding that the plaintiff is entitled to a judgment for the sum of $74,323.88."

Ruling This :exception is overruled.]

On February 3d, 1912, at the argument on the exceptions, defendant's counsel moved for leave to add the following exceptions to those already filed:—

"Pennsylvania Railroad Company defendant in above entitled action, by its attorneys, Murray & O'Laughlin, moves that there be added to its exceptions to finding of fact and of law and of opinion of the court, filed December 29th, 1911, the following exceptions:—

"1. The court erred in its fifth finding of fact, which said finding of fact is as follows:

" 'That beginning in the Summer of 1902 the defendant company, by virtue of telegraphic orders issued from the general officers in charge of the operation of the defendant company and carried out by the officers and train crews of the said company, gave to Berwind-White Coal Mining Company a preference in the distribution of cars on the defendant company's line, for use in the coal trade,
557 over the lines of the Mountain Division, and this preference, both directly and indirectly, affected the distribution of cars to the plaintiff company. These telegraphic orders for preference, as shown by the testimony, begin June 28th, 1902, from superintendent Wallis, of said company, located at Altoona, to subordinate officers, and direct that a preference up to 500 cars daily shall be given out of all cars to the mines of the Berwind-White Coal Mining Company at Scalp Level, and in addition thereto that from 100 to 250 cars be kept standing over each night so that the mines at Scalp Level shall be served early in the morning. That this preference in distribution affected the ratio of cars distributed to the plaintiff company as a part of the Mountain Division, appears in various telegrams, as follows: In that of J. M. Wallis to R. L. O'Donnell under date of October 16th, 1902, as follows: "Commencing at once please arrange to see that the mines of the Berwind-White Coal Mining Company at Scalp Level receive equal to 500 cars daily, counting steel cars as two, before placing at any other operation in the Scalp Level region or, on the Mountain." In telegram of October 21st, 1902, from Wallis to O'Donnell, "In addition to having 500 cars at Scalp, in order to protect it I will be glad if you will make a special effort to have from 150 to 200 cars standing over there each night, even if you do not place cars on the Mountain for coal. The mines of the Berwind-White Coal Mining Company must be supplied with equal to 500 cars each day in order that there may be no difficulty as result of accident or the cars being late. We are not prepared to take any chances on getting the cars to Scalp, and in addition to having 500 at their mines in time for loading daily, in order to protect ourselves we should have an extra 150 or 200 standing over each evening to start them in the morning. Please so arrange." Another telegram of the same date, from Wallis to O'Donnell, reads as follows: "We are not meeting with the success necessary to get

00 cars to Scalp daily. Will you please refer to my telegram last week requesting that equal to 599 (500) cars daily be placed 58 at the mines of the Berwind-White Coal Mining Company at Scalp, in addition to the cars placed at Yellow Run mine, in reference to placing cars at any other operation on the Mountain or in the South Fork District and see that the instructions are carried out. Special efforts should be made to get the cars to the mines in ample time for loading each day. The Berwind-White Coal Mining Company have not been able to coal the mail steamers in New York Harbor last week and this week. Most positive instructions should be issued and the arrangements carried out that equal to 500 cars will be at the mines of the Berwind-White Coal Mining Company, Scalp Level region each and every day before any attempt is made to supply cars to the mines of the Mountain, South Fork District or South Fork Railroad. Please advise if understood." And under date of November 22d, 1902, from J. M. Wallis to R. Pitcairn, Pittsburgh: "Please give Berwind mines at Scalp all the cars you have in the territory for tomorrow, cutting the other operations." That this preference continued and that it was a preference which affected particularly the mines on the Mountain Division appears later in a telegram from G. W. Creighton, then superintendent at Altoona, to S. C. Long, superintendent at Pittsburgh, in the following language: 'Our efforts this week in keeping Scalp supplied with cars have not been at all successful. Please renew the instructions to all parties interested that before placing cars for other operations on the Mountain or on the South Fork Railroad, equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day until further notice and it is important that sufficient cars should be placed early each morning so that all of the mines will have a supply to start with and there will be no danger of any operation being idle on account of not having cars. To protect ourselves on this arrangement I would be glad if you will arrange to accumulate and have standing over daily equal to 175 to 225 cars in addition to the 500 that are required for loading. This is absolutely necessary 559 in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the east carried out. The only exception that should be made to this order is for the Dunlo drift mine to have sufficient cars daily to protect the N. Y. P. & N. supply coal order, which I think is 200 tons per day. Acknowledge receipt." Said special orders were not rescinded during the period of action.' "

"2. The court erred in its sixth finding of fact which said finding is as follows:

" 'That (owing to the anthracite strike), beginning in the Spring of 1902 and continuing the balance of said year 1902 and throughout the year 1903, the bituminous coal trade of Pennsylvania along the lines of the Pennsylvania Railroad was unusually active and for that reason there was an unusual demand for cars from the defendant company by the coal operators along its lines, and that the defendant company did not have a sufficient car equipment to supply the existing demand. The defendant company, however, in face of

this shortage in car supply, did, in the month of July, 1902, sell of its car equipment then on hand and on its lines in operation in the coal trade seven hundred and twenty-seven steel coal cars to the Berwind-White Coal Mining Company, and agreed to sell and deliver in addition thereto two hundred and seventy-three additional cars of like character out of an equipment of one thousand cars then ordered or to be ordered and in course of construction, making in all one thousand cars; and all of which said one thousand cars were practically delivered by the said defendant company to the said Berwind-White Coal Mining Company during the said years 1902 and a few early in the Spring of 1903.'"

The grant of this motion was objected to by counsel for plaintiff on the ground that they were too late, it being more than thirty days from the time said opinion was filed; citing in support of their position Paul vs. Grimm, 123 Pa. St., 326, and Harris vs. Mercur, 202 Pa. St., 313.

The first exception is in some respects a repetition of de-
560–568 fendant's twenty-eighth exception previously filed. Said twenty-eighth exception quoted only part of the court's fifth finding of fact, whereas in this exception it quoted the whole of said fifth finding of fact.

The second exception which the defendant desires allowance to file, is entirely new. Under the authority of Paul vs. Grim (supra), and Harris vs. Mercur (supra), it is seriously doubted whether the court has any right to allow these additional exceptions. The defendant contends, of course, that it should be allowed and has the right to file additional exceptions, if allowed by the court, and which should be considered by the court because having already filed exceptions they are in court in that case and no delay is occasioned by filing additional exceptions.

For the purposes of this case we prefer to allow the exceptions, so that the defendant may have the benefit of the same, if desired. Both exceptions are, however, overruled.

Assignment of Error No. 21.

Decree.

[Now, February 12th, 1912, all the foregoing exceptions, both of the plaintiff and the defendant, having been overruled, or where modified such modification not affecting the amount of damages, to which action of the court as also to the entry of judgment as hereafter directed, at the request of the respective counsel, exception is noted and bill sealed. Further the prothonotary is hereby directed to enter judgment in the above stated case in favor of the plaintiff, the Puritan Coal Mining Company, and against the defendant, the Pennsylvania Railroad Company, in the sum of $74,323.88, with interest thereon from December 29th, 1911.]

By the Court.

ALLISON O. SMITH, *P. J.*

* * * * * * *

569 & 570 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1912.

No. 99.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Sur Appeal and Certiorari from the Judgment of the Court of Common Pleas of Clearfield County, Pennsylvania, of May Term, 1908, No. 221.

Assignments of Error.

* * * * * * *

2. The court erred in overruling the petition of the defendant to dismiss the action for want of jurisdiction to entertain the same.

* * * * * * *

571–573 4. The court erred in overruling the eighteenth exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the court thereon being as follows:

"18. The court erred in refusing to find as requested in the defendant's first request for findings of law, which request was as follows:

" 'The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the "Interstate Commerce Acts," in the Federal tribunals.' "

"Ruling: This exception is overruled."

5. The court erred in overruling the twentieth exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the court thereon being as follows:

"20. The court erred in refusing to find as requested in the defendant's third request for findings of law, which request was as follows:

" '3. Under the law and the evidence the plaintiff is not entitled to recover.' "

"Ruling: This exception is overruled."

* * * * * * *

574 10. The court erred in overruling the twenty-seventh exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the court thereon being as follows:

"27. The court erred in refusing to find as requested in the defendant's eleventh request for findings of fact, which request was as follows:

" '11. As it appears from the evidence that the cars used by the

plaintiff for its State shipments for deliveries of coal during the period of the action constituted a greater percentage of its mine rating than did the cars so used by the Berwind-White Company, the defendant has not been shown by the evidence to have been guilty of any unlawful discrimination cognizable in this action.'"

"Ruling: This exception is overruled."

11. The court erred in overruling the thirty-second exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the court thereon being as follows:

"32. The court erred in estimating the damages to which
575 it found the plaintiff to be entitled in accordance with the schedule which is embodied in its fifteenth finding of facts, and which was as follows:

(Here follow tables marked pages 576 and 577.)

	Steel Cars required to make equal with Scalp Level.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalize with Scalp Level.	Long in Other Cars.
1902					
April	3106.5	2074.5	4149	2548	1207
May	3424.5	2277.5	4555	2745	1084
June	3212	1980	3960	3024	1038
July	3187.5	1936.5	3873	3074	1545
Aug	3161	1620	3240	3085	703
Sept	2787.5	1493.5	2987	3099	627
Oct	2579.5	1353.5	2707	2705	429
Nov	2467	1327	2654	2058.5	599.5
Dec	1989.5	1191.5	2383	2081.5	642.5
1903					
Jan	1892	1102	2204	1995	464
Feb	2168	1205	2410	1586	91
Mar	2921	951	1902	2337.5	713.5
Apr	2364	976	1952	2025.5	62.5
May	2009.5	1005.5	2011	2089.5	734.5
June	2191	853	1706	1933.5	750.5
July	2192.5	828.5	1657	1713	766
Aug	2357.5	768.5	1537	1250	625
Sept	2170.5	812.5	1625	1310.5	690.5
Oct	1783	925	1850	1565.5	861.5
Nov	2044.5	1031.5	2063	1440	676
Dec	2181	1132	2264	2069.5	743.5
1904					
Jan	1963	1206	2412	1345	710
Feb	2045.5	858.5	1717	1301	907
Mar	2237.5	1149.5	2299	2012.5	1022.5
Apr	2643	1636	3272	1536.5	612.5
May	2600	1331	2662	1649	122
June	2056.5	1129.5	2259	1217	383
July	2044.5	1268.5	2537	1351	851
Aug	1608.5	807.5	1615	1847.5	230.5
Sept	1449	703	1406	1901	115
Oct	1866	1198	2396	1771	437
Nov	1577	828	1856	1648.5	202.5
Dec	1314.5	835.5	1671	1534.5	X(56.5)
	75604.5	39895.5	79791	64850	20344.5

X Is short.

Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalise with Scalp Level.	Long in Other Cars.	Net Shortage in cars (Steel as two).	Net Shortage in tons (Car 25 tons).	Puritan Distribution percentage for month as fixed by Deft.	Shortage in Puritan tonnage on acct. of car shortage.	Average selling price per ton.	Cost of production per ton.	Loss per ton	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss Penna. Delivery.	Total Loss Interstate Delivery.
2074.5	4149	2548	1207	2942	73550	8.2	6031.1	1.17	1.10	.07	422.18	78.23	21.77	330.27	91.91
2277.5	4555	2745	1084	3471	86775	8.1	7028.7	1.30	1.10	.20	1405.74	75.21	24.79	1057.26	348.48
1980	3960	3024	1038	2922	73050	8.1	5917.4	1.86	1.10	.76	4497.22	80.25	19.75	3609.02	888.20
1936.5	3873	3074	1545	2328	58200	8.1	4714.2	1.72	1.10	.62	3062.80	85.14	14.86	2607.67	455.13
1620	3240	3085	703	2537	63425	8.1	5137.4	1.47	1.10	.37	1900.84	88.86	11.14	1689.09	211.75
1493.5	2987	3099	627	2360	59000	7.8	4602	1.69	1.10	.59	2715.18	81.88	18.12	2223.19	491.99
1353.5	2707	2705	429	2278	56950	7.8	4442.1	2.54	1.10	1.44	6396.62	86.79	13.21	5551.63	844.99
1327	2654	2058.5	599.5	2054.5	51362.5	7.6	3903.5	2.28	1.10	1.18	4606.13	86.93	13.07	4004.11	602.02
1191.5	2383	2081.5	642.5	1740.5	43512.5	9.5	4133.6	2.80	1.10	1.70	7027.12	91.05	8.95	6398.19	628.93
1102	2204	1995	464	1740	43500	9.7	4219.5	3.22	1.10	2.12	8945.34	92.27	7.73	8253.96	691.38
1205	2410	1586	91	2319	57975	9.6	5565.6	2.09	1.10	.99	5509.94	88.46	11.54	4874.09	635.85
951	1902	2337.5	713.5	1188.5	29712.5	9.5	2822.6	1.59	1.10	.49	1383.07	87.95	12.05	1216.41	166.66
976	1952	2025.5	62.5	1889.5	47237.5	9.7	4582	1.57	1.15	.42	1924.44	91.98	8.11	1768.37	156.07
1005.5	2011	2089.5	734.5	1276.5	31912.5	8.5	2712.5	1.52	1.15	.37	1003.63	94.97	5.13	952.14	51.49
853	1706	1933.5	750.5	955.5	23887.5	8.5	2030.4	1.53	1.15	.38	771.55	90.64	9.36	699.33	72.22
828.5	1657	1713	766	891	22275	8.5	1893.3	1.55	1.15	.40	757.32	96.39	3.61	729.98	27.34
768.5	1537	1250	625	912	22800	8.5	1938.0	1.50	1.15	.35	678.30	87.73	12.27	595.07	83.23
812.5	1625	1310.5	690.5	934.5	23362.5	6.0	1401.7	1.50	1.15	.35	490.60	86.86	13.14	426.14	64.46
925	1850	1565.5	861.5	988.5	24712.5	5.7	1408.6	1.46	1.15	.31	436.67	85.90	14.10	375.10	61.57
1031.5	2063	1440	676	1387	34675	6.0	2080.5	1.48	1.15	.33	686.57	90.06	9.94	618.33	68.24
1132	2264	2069.5	743.5	1520.5	38012.5	6.0	2280.7	1.44	1.15	.29	661.40	93.97	6.03	621.52	39 88
1206	2412	1345	710	1702	42550	6.0	2553	1.43	1.15	.28	714.84	87.67	12.33	626.70	88.14
858.5	1717	1301	907	810	20250	6.0	1215	1.41	1.15	.26	315.90	73.88	26.12	233.39	82.51
1149.5	2299	2012.5	1022.5	1276.5	31912.5	6.0	1914.7	1.43	1.15	.28	536.12	81.15	18.85	435.05	101.06
1636	3272	1536.5	612.5	2659.5	66487.5	6.0	3989.2	1.31	1.15	.16	638.27	83.94	16.06	535.76	102.51
1331	2662	1649	122	2540	63500	6.9	3746.5	.....	.....	.....	.....	81.79	18.21		
1129.5	2259	1217	383	1876	46900	6.9	2777.1	.....	.....	.....	.....	93.89	6.11		
1268.5	2537	1351	851	1986	49650	5.6	2780.4	.....	.....	.....	.....	95.93	4.07		
807.5	1615	1847.5	230.5	1384.5	34612.5	5.6	1938.3	.....	.....	.....	.....	88.46	11.54		
703	1406	1901	115	1293	32325	5.6	1810.2	1.23	1.12	.11	199.12	80.95	19.05	161.19	37.93
1198	2396	1771	437	1959	48975	5.6	2742.6	1.23	1.12	.11	301.68	90.59	9.49	273.06	28.63
828	1856	1648.5	202.5	1653.5	41337.5	5.6	2314.9	1.23	1.12	.11	254.64	73.72	26.28	187.72	66.92
835.5	1671	1534.5	X(56.5)	1727.5	43187.5	5.6	2418.5	1.23	1.12	.11	266.04	80.48	19.52	204.11	51.93
39895.5	79791	64850	20344.5	59503.0	1487573.0	.....	109045.4	.....	.....	.....	58509.27	.....	.....	51257.85	7251.42

578 "Ruling: This exception is overruled."

12. The court erred in overruling the thirty-third exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the court thereon being as follows:

"33. The court erred in failing to take into account the private or individual cars, so-called, which were delivered to the plaintiff during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the court has found should have been allotted to the region or district in which the plaintiff's mines were located."

"Ruling: This exception raises a question not before considered by the court and never suggested by counsel. The method by which the court calculated the damages of the plaintiff left out of consideration the individual cars placed in both the Mountain Division and the Scalp Level Division. This method was adopted by the court for the reason that individual cars were not charged against owners in making distribution until 1906, as shown by the testimony of Mr. Trump, on pages 200 and 201. This date was long after the period of the action. The defendant company, therefore, as a matter of law and morals should be bound by the position it made for itself and should be estopped from repudiating the rule it enforced, even if later it is found that such rule was technically wrong. This, for the principle that no suitor may come into court and assert a principle or maintain a position that would enable it to profit by its own wrong. Prior to and at the trial of the case the defendant never presented a claim that individual cars should be taken into consideration and never before these exceptions were filed made

579 any claim that by excluding individual cars a different amount of damage would be ascertained. Without great labor at this time we are wholly unable to determine whether the amount of damages found by the court, would be changed by taking into consideration individual cars. The theory, however, on which the railroad acted in distributing cars to its patrons by excluding or not charging against such patrons the individual cars placed, during the period of the action, is we believe the true measure of damages as set out in the schedule adopted by the court. The defendant company should be estopped from claiming any other measure, even if in its favor, on the same principle or feature of the doctrine of estoppel expressed in Railway Co. vs. McCarthy, 96 U. S. 258-268. In that case Justice Swayne says, 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.' To the same effect is Ice Co. vs. Improvement Co., 232 Pa. St., 293-300. Moreover to adopt any other theory after the fact and policy of the method of distribution followed by the defendant would work a manifest hardship against a shipper suing for damages who had no individual cars. This is especially true, if the method of calculating and

scheduling damages adopted by the court is the correct theory in this case, because the Mountain Division did have a certain proportion of individual cars just as did the Scalp Level Division.
580 But if some unfortunate individual shipper of the Mountain Division had no private or individual cars during the period of his action, he would be charged with his proportion of individual cars placed in his division, manifestly to his injury, on the theory of damages adopted by the court. This of itself proves its falsity. Moreover it is apparent from the tables obtained from the distribution sheets that the individual cars of the Mountain Division were less than those of the South Fork and Scalp Level Division, the former being 67,395 and the latter 81,031. Of what avail then would be the present claim of the defendant that the method adopted by the court was not the true method? Again, the kind, character and size of the individual cars placed, either to the Mountain Division or to the South Fork and Scalp Level Division, were not scheduled in the case, for which reason alone no equitable basis of calculation could have been made by the court. As shown in the testimony, the favored shipper, namely, Berwind-White Coal Mining Company, obtained from the defendant company as its own individual cars at least one thousand steel cars counted as two in our calculation, while the testimony also shows that whatever of individual cars the plaintiff company had were of a lesser capacity. Manifestly, therefore, the court could not have made and cannot now make from any data in the case an equitable schedule of damages on the theory now for the first time presented in this exception. That theory might have been of some consequence had the court adopted the theories of damages claimed by the plaintiff, in which only the respective car supplies of the plaintiff company and
581 the Berwind-White Coal Mining Company were considered. Not having adopted the plaintiff's theory of damages, the court is of the opinion that the defendant railroad company should be bound by its own course of conduct and method of distribution in dealing with both the individual cars of the plaintiff company as the party discriminated against and as to the Berwind-White Coal Mining Company, the favored shipper.

"In connection with this exception defendant's counsel submitted a schedule of damages alleged to have been based on the court's theory of the case, which shows injury to the extent of $33,797.69, without damages in lieu of interest. The vice of this schedule is that it starts with the sixth column of the schedule adopted by the court, showing 'net shortage in cars, steel as two.' The results in the sixth column are obtained by comparison between the Mountain Division and the Scalp Level Division of all cars other than individual cars placed in both regions. No individual cars in either region enters into the equalization shown in the court's first column. The result of the defendant's schedule, therefore, is that the plaintiff company is charged with its proportion of individual cars twice, while the individual cars furnished to the favored shipper *has* never been considered in the calculation. This schedule it is presumed

	Mountain Region's Net Shortage in cars as determined by Court.	Individual cars placed at mines in Mountain Region as determined by Court.	Aggregate of additional cars which Court has found Mountain Region should have received and of individual cars placed at mines in that Region.	Puritan distribution percentage for month as adopted by Court.	Proportion of aggregate excess cars and individual cars to which Puritan entitled based on its percentage.
1902					
April	2942	2331	5273	8.2	432
May	3471	2600	6071	8.1	491
June	2922	2252	5174	8.1	419
July	2328	2135	4463	8.1	361
Aug	2537	2021	4558	8.1	369
Sept	2360	2102	4462	7.8	348
Oct	2278	1915	4193	7.8	327
Nov	2054.5	1927	3981.5	7.6	302
Dec	1740.5	1723	3463.5	9.5	329
1903					
Jan	1740	1273	3013	9.7	292
Feb	2319	1434	3753	9.6	360
Mar	1188.5	2035	2223.5	9.5	306
Apr	1889.5	1856	3745.5	9.7	363
May	1276.5	1937	3213.5	8.5	273
June	955.5	2021	2976.5	8.5	253
July	891	1856	2747	8.5	233
Aug	912	2218	3130	8.5	266
Sept	934.5	2148	3082.5	6.0	184
Oct	988.5	2537	3525.5	5.7	200
Nov	1387	2374	3761	6.0	225
Dec	1520.5	2079	3599.5	6.0	215
1904					
Jan	1702	1537	3239	6.0	194
Feb	810	1943	2753	6.0	165
Mar	1276.5	2053	3329.5	6.0	199
Apr	2659.5	1980	4639.5	6.0	278
May	2540	1793	4333	6.9	298
June	1876	1863	3739	6.9	257
July	1986	2037	4023	5.6	225
Aug	1384.5	2195	3579.5	5.6	200
Sept	1293	1928	3221	5.6	180
Oct	1959	2547	4506	5.6	252
Nov	1653.5	2214	3867.5	5.6	216
Dec	1727.5	2528	4255.5	5.6	238
	59503.0	67392	126895.0	.....	9250

(*) This total includes only cars short. Cars over are not deducted. If "overs"

(To face page 1

	Mountain Region's Net Shortage in cars as determined by Court.	Individual cars placed at mines in Mountain Region as determined by Court.	Aggregate of additional cars which Court has found Mountain Region should have received and of individual cars placed at mines in that Region.	Puritan distribution percentage for month as adopted by Court.	Proportion of aggregate excess cars and individual cars to which Puritan entitled based on its percentage.	Individual cars actually placed at Puritan Mines.	Number of additional cars Puritan should have received.	Shortage in Puritan tonnage. Car 25 tons.	Loss per ton as adopted by Court.	Total loss Puritan Company ascertained with reference to profit per ton found by Court, but with reference to shortage in tonnage ascertained with reference to individual cars placed at its Mines.	Percentage of loss on Penna. delivery as adopted by Court.	Total loss Penna. Delivery.
.....	2942	2331	5273	8.2	432	206	226	5650	.07	395.50	78.23	309.39
.....	3471	2600	6071	8.1	491	301	190	4750	.20	950.00	75.21	714.49
.....	2922	2252	5174	8.1	419	242	177	4425	.76	3363.00	80.25	2698.80
.....	2328	2135	4463	8.1	361	239	122	3050	.62	1891.00	84.14	1591.08
.....	2537	2021	4558	8.1	369	223	146	3650	.37	1350.50	88.86	1200.05
.....	2360	2102	4462	7.8	348	213	135	3375	.59	1991.25	81.88	1630.43
.....	2278	1915	4193	7.8	327	219	108	2700	1.44	3888.00	86.79	3374.39
.....	2054.5	1927	3981.5	7.6	302	288	14	350	1.18	413.00	86.93	359.02
.....	1740.5	1723	3463.5	9.5	329	222	107	2675	1.70	4547.50	91.05	4140.49
.....	1740	1273	3013	9.7	292	95	197	4925	2.12	10441.00	92.27	9633.91
.....	2319	1434	3753	9.6	360	130	230	5750	.99	5692.50	88.46	5035.58
.....	1188.5	2035	2223.5	9.5	306	230	76	1900	.49	931.00	87.95	818.81
.....	1889.5	1856	3745.5	9.7	363	254	109	2725	.42	1144.50	91.98	1052.71
.....	1276.5	1937	3213.5	8.5	273	266	7	175	.37	64.75	94.97	61.49
.....	955.5	2021	2976.5	8.5	253	244	9	225	.38	85.50	90.64	77.49
.....	891	1856	2747	8.5	233	282	(over) 49	.....	.40	.....	96.39	
.....	912	2218	3130	8.5	266	219	47	1175	.35	411.25	87.73	360.78
.....	934.5	2148	3082.5	6.0	184	240	(over) 56	.....	.35	.....	86.86	
.....	988.5	2537	3525.5	5.7	200	280	(over) 80	.....	.31	.....	85.90	
.....	1387	2374	3761	6.0	225	255	(over) 30	.....	.33	.....	90.06	
.....	1520.5	2079	3599.5	6.0	215	259	(over) 44	.....	.29	.....	93.97	
.....	1702	1537	3239	6.0	194	179	15	375	.28	102.20	87.67	89.59
.....	810	1943	2753	6.0	165	200	(over) 35	.....	.26	.....	73.88	
.....	1276.5	2053	3329.5	6.0	199	232	(over) 33	.....	.28	.....	81.15	
.....	2659.5	1980	4639.5	6.0	278	237	41	1025	.16	164.00	83.94	137.66
.....	2540	1793	4333	6.9	298	219	79	1975	.....	.....	81.79	
.....	1876	1863	3739	6.9	257	124	133	3325	.....	.....	93.89	
.....	1986	2037	4023	5.6	225	107	118	2950	.....	.....	95.93	
.....	1384.5	2195	3579.5	5.6	200	132	68	1700	.....	.....	88.46	
.....	1293	1928	3221	5.6	180	127	53	1325	.11	145.75	80.95	117.99
.....	1959	2547	4506	5.6	252	142	110	2750	.11	302.50	90.59	274.03
.....	1653.5	2214	3867.5	5.6	216	259	(over) 43	.....	.11	.....	73.72	
.....	1727.5	2528	4255.5	5.6	238	184	54	1350	.11	148.50	80.48	119.51
	59503.0	67392	126895.0	.....	9250	7049	(*) 2571	64275	.....	38423.20	.....	33797.69

(*) total includes only cars short. Cars over are not deducted. If "overs" deducted net shortage would be 2201 cars.

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was intended to be attached and made a part of this exception and is so treated. From it thus attached the truth of the above objections can be readily ascertained. For the above reasons, therefore, this exception is hereby overruled."

(Copy of schedule submitted with above exception.)

(Here follow tables marked pages 582 and 583.)

584-592 19. The court erred in overruling the thirty-fifth exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the
593 court thereon being as follows:—

"35. The court erred in finding that the plaintiff had sustained damages exclusive of those resulting from delay to the amount of $51,257.85."

"Ruling: This exception is overruled."

20. The court erred in overruling the thirty-sixth exception of the defendant to the court's report and findings of fact and law, said exception and the ruling of the court thereon being as follows:

"36. The court erred in finding that the plaintiff is entitled to a judgment for the sum of $74,323.88."

"Ruling: This exception is overruled."

21. The court erred in making the following order: "Now, February 12th, 1912, all the foregoing exceptions, both of the plaintiff and the defendant, having been overruled, or where modified such modification not affecting the amount of damages, to which action of the court as also to the entry of judgment as hereafter directed, at the request of the respective counsel, exception is noted and bill sealed. Further the Prothonotary is hereby directed to enter judgment in the above stated case in favor of the plaintiff, the Puritan Coal Mining Company, and against the defendant, the Pennsylvania Railroad Company, in the sum of $74,323.88, with interest thereon from December 29th, 1911."

FRANCIS I. GOWEN,
THOMAS H. MURRAY,
JAMES P. O'LAUGHLIN,
HAZARD ALEX. MURRAY,
Counsel for Appellant.

594 Endorsement: In the Supreme Court of Pennsylvania, for the Eastern District.—No. 99, January Term, 1912.—Puritan Coal Mining Company vs. Pennsylvania Railroad Company.—Assignments of Error.—Filed Apr. 15, 1912, in Supreme Court.

595 In the Supreme Court of Pennsylvania, Eastern District.

No. 99, of Jan. Term, 1912.

PURITAN COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellant.

Appeal from the Court of Common Pleas of Clearfield County.

Filed October 14, 1912.

STEWART, *J.:*

This was an action brought by the Puritan Coal Mining Company against the Pennsylvania Railroad Company, to recover damages

for alleged undue and unlawful discrimination against the plaintiff in the matter of the distribution of cars for shipment of coal during a period beginning 1, April 1902, and ending 31, December 1904. By agreement between the parties a trial by jury was waived, and the case was heard by the court, resulting in a judgment for the plaintiff in the sum of $74,323.88. In discussing the points put in issue by this appeal as indicated by the several assignments of error, we shall observe the order followed by counsel for appellant in their submitted brief of argument, and confine the discussion to those questions which are there urged upon our attention.

"(1) The first proposition advanced in support of the appeal is, That even if the plaintiff has at any time a claim of the character asserted in the present action it had voluntarily transferred it to others prior to the trial of the case, and had thereby deprived itself of the right to maintain the action or to recover damages claimed therein."

Briefly the facts are these. During the period covering the alleged discrimination, and at the commencement of the action, three individuals owned the entire capital stock of the plaintiff corporation. Subsequently, by a written agreement, these persons
596 sold the stock, reserving to themselves individually the claim covered by the present action, with the right of access to the books and papers of the company and the right to continue the present action in its name, with the further stipulation that in case of settlement by the coal company, the money received therefor was to be paid over to the three selling the stock, who were to have the entire control of any adjustment or settlement. The objection urged in the court below, and here renewed, is that the transaction was a virtual assignment by the coal company of its claim for damages to the individuals so parting with their stock; and that because of the character of the claim recovery cannot be had therefor in the name of the assignor. The argument in support of the contention fails to distinguish between the corporation and its shareholders. They are not one and the same. The latter are not owners of the property of the corporation, but the title to the property rests exclusively in the entity called the corporation. It follows that shareholders of a corporation have not, by mere fact of being shareholders, any agency for the corporation or any authority to act for it; nor can they convey or assign its property although all unite, unless through formal action of the corporation they have been made its agents to that end. Cyc. Vol. 10, p. 374. None of the stipulations in the contract for the sale and purchase of this stock bound the corporation in the remotest way. It could have refused the use of its name in an action for the recovery of this specific claim, and it could have denied the vendors of the stock access to the books of the company without incurring corporate liability. The claim remained the claim of the corporation notwithstanding the fact that the individual shareholders had agreed that others ceasing to be shareholders should receive the benefit of it. With the rights and equities of these parties as between themselves we have here no concern; nor does it concern

us to anticipate what the corporation may or may not do with the damages in the event it recovers.

597 The second proposition which appellant seeks to maintain is as follows:

"(2) That the court below was without jurisdiction to entertain the action, due to the fact that the only subsisting obligations to which the defendant was subject in respect to the distribution of its cars during the period of the action were those imposed upon it by the Acts of the Congress of the United States known as the 'interstate Commerce Acts,' which Acts prescribe and designate the forums in which actions for non-observance of the obligations thereof may be brought, these being either the Commission created by these Acts or the Federal Courts, and not the State Courts."

For a correct understanding of the point involved, a fuller statement of the facts is here necessary. That we may do no injustice to appellant in this regard we recite the facts as they are stated in the history of the case furnished by itself, and we accept these with the single qualification that it nowhere appears that the shortage of cars, the subject of plaintiff's complaint, was due to the delivery of an excessive number to the Berwind-White Coal Mining Company.

"The defendant, during the period of the action was engaged in the transportation of bituminous coal, and the plaintiff was a shipper over its lines.

The coal transported by the defendant was transported to points both within and without the State of Pennsylvania, and this was true of that shipped by the plaintiff.

To facilitate the distribution of its coal cars among the operators on its lines, the coal territory tributary to the defendant's lines had been divided by it into several regions or districts. The mines of the plaintiff, three in number, known as 'Puritan Nos. 1, 3 and 5,' were located in a district known as the 'Pittsburg-East End' or 'Mountain' District. The Berwind-White Coal Mining Company owned and operated a large number of mines also located on the line of the defendant, which were situated in a district known as the 'Scalp Level' district. All of the mines on the defendant's lines were given certain ratings based upon their shipping capacity, and the distribution of the cars in times of shortage was, as a rule, made in accordance with these ratings.

In the period of the action, however, which included the period of the anthracite coal strike of 1902, the distribution of cars in accordance with the ratings was largely departed from, and that actually made was controlled, more or less by what were known and are referred to in the testimony as 'special orders.' The distribution *was* made to the Berwind-White Coal Company's mines was largely of this character.

Separate distributions of its cars were not made by the defendant for shipments to points within and without the State, respectively;

598 but one distribution was made, and no control was exercised or was attempted to be exercised by the defendant over the use which should be made of the cars as between the two classes of shipments, this being left optional with the operator to

whom the cars were delivered, who could use them entirely for shipments to points within the State, or part for one and part for the other purpose.

The plaintiff, upon the theory that, having regard to their respective ratings, the Berwind-White Coal Mining Company, under and by virtue of the special orders in its favor, had secured a larger number of cars than it had received, instituted the present action, and by its statement alleged and charged that it had been unjustly deprived of a portion of the cars which the ratings of its mines entitled it to, due to the delivery of an excessive number to the Berwind-White Coal Mining Company."

From this statement of the facts, and the claim of the plaintiff based thereon, it is quite apparent that nothing was involved but the single question whether, in the matter of the distribution of its cars, the defendant unduly and unreasonably discriminated against the plaintiff to the latter's loss and injury, by furnishing to a competitor shipping facilities for transportation to a measure and degree denied and refused the plaintiff under like conditions. If the case was with the plaintiff on its facts—and it so found—then we have an offence threefold in character; first, the offence against common law; second, an offence against the Federal Statute regulating interstate commerce, which by the third section provides that it shall be unlawful for any common carrier subject to its provisions, "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any way whatsoever, or to subject any particular person, company, firm, corporation, or any locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" and, third, an offence against our own state statute of 3, June 1883, which declares that "any undue or unreasonable discrimination by any railroad company, or other common carrier * * * in charge for or in facilities for, the transportation of freight
599 within the state, or coming from or going to any other state," shall be unlawful. For injury so sustained to what tribunal may the injured party look for redress? Are the courts of his own state closed against him, and must his only recourse be to a Federal tribunal? Were the question an untried one, its determination would necessarily involve a study and consideration of those principles and rules which are applied to questions arising out of the dual character of our government. This, however, may here be avoided, since, as we view the case, its determination may be rested on express authority defining and determining the scope and effect of the Federal Statute. By repeated decisions of the Supreme Court of the United States within recent years, the boundary line limiting state jurisdiction in matters which may affect interstate commerce, has been so clearly indicated, that when a question such as this arises we have but to decide whether the particular offence complained of falls on the hither side of the boundary line or beyond; not that Federal jurisdiction is thereby correspondingly limited, but, when the latter invades the limits allowed the state, the jurisdiction be-

comes concurrent. We refer specially to the case of Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612, wherein it is distinctly held that, where exclusive jurisdiction is claimed for the Federal courts under the Interstate Commerce Act, the primary, and, if answered affirmatively, the only question, must be, has Congress legislated with respect to the particular act of discrimination complained of by regulation or otherwise? If it has, then exclusive jurisdiction results to the Federal courts; if it has not, then, and only then, is the question whether the State act conflicts with the Federal statute by imposing burdens and hinderances upon interstate commerce to be considered. In the case cited the controversy arose from the refusal of the railroad company to make transfer of empty cars from
600 a transfer track maintained by the offending road to another connecting road to the mills and elevator of the plaintiff. The two roads had held themselves out as ready to do such transferring. The ground of refusal to make the transfer was that the shipper had refused to pay certain demurrage charges against it. It was replied to this that the detention of the cars for which demurrage was charged was occasioned solely by the inadequate and defective service of the railroad company. The contention of the plaintiff in this regard was sustained, and the case, as so resolved, presented the same question we have here—whether for discrimination in furnishing facilities for transportation the carrier was amenable solely to Federal law. In the opinion delivered by Mr. Justice Brewer we have such an explicit statement of the facts, and such a clear exposition of the law governing, that nothing will adequately supply what a liberal quotation therefrom will furnish. On page 620 he says:

"But the main contention on the part of the Missouri Pacific runs along an entirely different line. It is that the Missouri Pacific and the Santa Fe are common carriers, engaged in interstate commerce, and as such are subject to the control of Congress, and, therefore, in these respects not amenable to the power of the State. It appears from the findings that about three-fifths of the flour of the mill company is shipped out of the State, while the other two-fifths is shipped to points within the State. In addition, the hauling of the empty cars from the Santa Fe track to the mill was, if commerce at all, commerce within the State.

The roads are, therefore, engaged in both interstate commerce and that within the State. In the former they are subject to the regulation of Congress; in the latter to that of the State, and to enforce the proper relation between Congress and the State the full control of each over the commerce subject to its dominion must be preserved. Fairbanks v. United States, 181 U. S. 283. How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the first section of the Interstate Commerce Act of February 4, 1887, c. 104, Stat. 379, as well as that of June 29, 1906, c. 3591, 34 Stat. 584, for each provides; 'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Ter-

itory as aforesaid.' This case does not rest upon any distinction between interstate commerce and that wholly within
301 the State. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the State, n the absence of express action of Congress, may regulate many natters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule there can be no question. It is settled and illustrated by many cases. Thus in Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, it was held that a regulation of pilots and pilotage was a regulation of commerce within the grant of the power of congress, but further that (p. 319): 'The mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power of the States, and the States may legislate n the absence of Congressional regulations. Sturges v. Crowinshield, 4 Wheat., 193; Houston v. Moore, 5 Wheat. 1; Wilson v. Blackbird Creek Company, 2 Pet., 251.'

In Cleveland &c. Ry. Co. v. Illinois, 177 U. S. 514, is a collection by Mr. Justice Brown, speaking for this court, of a number of these cases. We quote from the opinion (pp. 516-517): 'Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railroad tracks, and adjacent property owners, as well as other regulations intended for the public good.' * * *

On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this had not been held to interfere with the power of the States in these incidental matters. A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens."

We derive from this opinion these inevitable conclusions: (1) that

where Congress prescribes a particular act, not in itself an offence at common law, jurisdiction with relation thereto attaches to
602 the Federal courts; (2) where the act is an offence at common law, and made so as well by State statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the State courts; (3) that the Interstate Commerce Act does not attempt any more than does the common law to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission; (4) that when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress had specially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offence to the Federal tribunal; (5) that except as to the thing the Commission has defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the State courts according to their own statute, or the common law as the case may be. It is only necessary to quote the following extract from the opinion in the later case of Southern Ry. Co. v. Reed, 222 U. S. 424, to show how the doctrine declared in the earlier case from which we have quoted at length is there reasserted and applied. We quote from the opinion of Mr. Justice McKenna, page 436:

"It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in Missouri Pacific Railway Co. v. Larabee Mills, 211 U. S. 612, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by non-action leaves power in the States over merely incidental matters. 'In other words,' and we quote from the opinion (p. 623), 'the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. * * * Until specific action by Congress or
603 the commission the control over those incidental matters remains undisturbed,' the duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared (p. 624) to be a common law duty which the State might, 'at least in the absence of Congressional action, compel a carrier to discharge.' The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission, covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the commission has acted, so we must look to the act. Does it, as contended by the plaintiff in error, take control of the subject matter

and impose affirmative duties upon the carriers which the State cannot even supplement? In other words, has Congress taken possession of the field?"

In the light of these express authorities all other questions may be eliminated from the present discussion except this governing one; has Congress specifically legislated with respect to the offence complained of? That is to say, has it, either by the Interstate Commerce Act in terms, or by any decree or order of the agency, created thereunder, the Interstate Commerce Commission, declared that the matters here complained of as the foundation of plaintiff's case shall constitute an undue or unreasonable preference? For very evident reasons the Federal statute is most general in its terms, dealing specifically with few matters. Because it is only with respect to very few matters affecting interstate commerce that conditions are so universally alike as to admit of one uniform system or plan of regulation with respect thereto, that Congress committed to the Interstate Commerce Commission the task of definition; and this the latter may perform in any case upon complaint of any one claiming to have been damaged by unjust discrimination at the hands of a common carrier under the ninth section of the Act. Under this provision the Commission has exercised a wide jurisdiction; it has adjudged isolated and peculiar cases; and in others, where the adjudication was not dependent upon local and other peculiar conditions, it has formulated general rules for the observance of all. It is needless for our purpose to cite instances of the former, and a single
604 instance of the latter will suffice. We cite it as much because it is a case upon which the appellant relies as supporting its present contention. Our reference is to the case of the Illinois Central Railroad Company v. Interstate Commerce Commission, 215 U. S., 481. There the controversy began with the complaint of a Collieries Company filed with the Interstate Commerce Commission complaining that the Illinois Central Railroad Company was unduly discriminating in the matter of car distribution, in not taking into consideration the foreign railway fuel cars and private cars in determining the distribution of coal cars among the various operators along the line of the railroad or interstate shipments of coal. The Commission held that the complaint was well founded, and awarded relief through an order so interpreting the Interstate Commerce Act as to require the railroad company to desist from such practice and establish regulations providing for the accounting of all such cars. Unwilling to comply with the order so made, the Illinois Central Railroad commenced this action to enjoin the enforcement of the order of the Commission, alleging that the order was unjust and unreasonable for various reasons, and that in making the order the Commission exceeded its power. The Commission replied traversing the allegations in the complaint, and asserting that the subject of the distribution of coal cars as dealt with by the order was within the administrative power delegated to the Commission by the terms of the act regulating interstate commerce. From a decree enjoining the company from enforcing its order an appeal was sustained, and

it was held that it is within the delegated power of the Interstate Commerce Commission to regulate railroad companies doing interstate business in the distribution of their cars, and required them to take into account its own fuel cars in order not to create a preference of the mines to which such cars are assigned over other mines.

605 It is impossible to conceive of any local or other conditions which would prevent such order with respect to the fuel cars of the carrier from operating generally with the same measure of justice and equity to all, and hence we conclude that not only does the rule announced govern in the regulation of the Illinois Central Railroad Company, but that it applies to and governs, upon the authority of the cases above cited, all railroads; that it is as much the law of the land as though written in the lines of the Interstate Commerce Act, and that having been legislated upon by the Commission exclusive jurisdiction with respect thereto vests in the Federal tribunal. It is only necessary to distinguish between the subject of the complaint in that case and this. There, by the action of the Commerce Commission, again using the language of Mr. Justice McKenna in the latter case above referred to, Congress had taken possession of this particular field, and had declared the refusal to take into account the fuel cars of the carrier unlawful. Here it is not complained that defendant had disregarded any order of the Commission; nor has any order of the Commission even remotely regulating the subject of the complaint here been shown. What is complained of is that the defendant having voluntarily adopted a system for the distribution of its cars which it must have regarded as just and equitable, and from which it makes no claim to be released, openly and flagrantly disregarded it by daily distributing to the Berwind-White Coal Company a much larger number of cars than its rating called for, while furnishing complainant with less than it was entitled to under its rating. The grouping of plaintiff's mines in a class with others for purposes of service; the determination of the total number of cars to be devoted to such service; the ratings of the several mines within the group and the pro rata of distribution, were not matters regulated by the order of the Commission, but matters decided upon by the defendant company

606 with a view to avoid prejudice to the shipper. Had the plaintiff been dissatisfied with the regulation it could have appealed to the Commission to correct it; had its appeal been sustained and followed by an order of amendment or correction of the regulation, then, upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the Federal Court, since in that case again Congress would have taken possession of the field. But there is nothing of that kind here; nothing but a case of discrimination pure and simple; not a specific offence created by the express terms of the Federal statute, not an offence against any order of the Commerce Commission, but an offence which could fall within the Federal statute and the common law as well, and so be held to have been legislated upon by Congress, only as the Interstate Commerce Commission has so declared.

Our own State statute rests for its authority on the police power of the state, and its sole object is to prohibit common carriers which derive all their powers from the state, and have been granted these to the end that they may serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of. The thing condemned by our State statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. v. Larabee Mills, supra. The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It
607 was sufficient that the offence was committed within the State. For the reasons stated we must decline to sustain the defendant's second proposition.

The third and fourth propositions are simply derived from the second; they call for no further discussion of the point raised, and we pass them. The fifth is as follows:

"5. That upon the assumption that the State Act of 1883 applied to the distribution by the defendant of cars used for intrastate shipments, and that the evidence had established that in making such distribution the defendant had unjustly discriminated against the plaintiff, the method adopted by the court below for ascertaining the number of cars which the plaintiff was thereby deprived of, and the proportion of these which would have been used for intrastate shipments, was erroneous and hurtful to the defendant."

This contains but a single feature which calls for consideration, viz: that the method adopted by the court for ascertaining the number of cars the plaintiff was deprived of was erroneous. We shall consider this in connection with the sixth which is as follows:

"6. That in the ascertainment of damages sustained by the plaintiff, due to its inability to mine and sell additional coal which the court below found it could have shipped had cars therefor been available, an assumed cost of production was adopted by the court which the evidence did not warrant, and certain payments which the plaintiff would have been obliged to make, had the additional coal been mined, were ignored and disregarded, and the assumed profits thereby materially enhanced."

To facilitate the distribution of its own cars, the defendant company determined by its own action to group into one the coal producing districts over which the Berwind-White Company mines were located known as the Scalp Level District, and the district in which the plaintiff's mines were located known as the Mountain District. It rated the several mines in each according to their respective producing capacity, with a view to determine a fair and

just distribution of the cars which it allowed to be available during the continuance of the shortage. The court found that the aggregate distributive rate of the two divisions for the purpose of distribution was about equal, and adopted this fact for the determination of the measure of damages. In this connection we re-
608 cite the fifth finding of fact by the court. The effect of it can be understood only as it is given entire:

"Fifth. That beginning in the summer of 1902 the defendant company, by virtue of telegraphic orders issued from the general officers in charge of the operation of the defendant company and carried out by the officers and train crews of the said company, gave to the Berwind-White Coal Mining Company a preference in the distribution of cars on the defendant company's line, for use in the coal trade, over the mines of the Mountain Division, and this preference, both directly and indirectly, affected the distribution of cars to the plaintiff company. These telegraphic orders for preference, as shown by the testimony, begin June 28th, 1902, from Superintendent Wallis, of said company, located at Altoona, to subordinate officers; and direct that a preference up to 500 cars daily shall be given to the mines of the Berwind-White Coal Mining Company at Scalp Level, and in addition thereto that from 100 to 250 cars be kept standing over each night so that the mines at Scalp Level shall be served early in the morning. That this preference in distribution affected the ratio of cars distributed to the plaintiff company as a part of the Mountain Division appears in various telegrams, as follows: In that of J. M. Wallis to R. L. O'Donnel, under date of October 16th, 1902, as follows: 'Commencing at once please arrange to see that the mines of the Berwind-White Coal Mining Company at Scalp Level receive equal to 500 cars daily, counting steel cars as two, before placing, at any other operation in the Scalp Level region or on Mountain.' In telegram of October 21st, 1902, from Wallis to O'Donnell, 'In addition to having 500 cars at Scalp in order to protect it I will be glad if you will make a special effort to have from 150 to 200 cars standing over there each night, even if you do not place cars on the Mountain for coal. The mines of the Berwind-White Coal Mining Company must be supplied with equal to 500 cars each day in order that there may be no difficulty as result of accident or the cars being late. We are not prepared to take any chances on getting the cars to Scalp, and in addition to having 500 at their mines in time for loading daily, in order to protect ourselves we should have an extra 150 or 200 standing over each evening to start them in the morning. Pleas- so arrange.' Another telegram of the same date, from Wallis to O'Donnel, reads as follows: 'We are not meeting with the success necessary to get 500 cars to Scalp daily. Will you please refer to my telegram last week requesting that equal to 500 cars daily be placed at the mines of the Berwind-White Coal Mining Company at Scalp, in addition to the cars placed at Yellow Run mine, in preference to placing cars at any other operation on the Mountain or in the South Fork district and see that instructions are carried out. Special efforts should be made to get the cars to the mines in ample time for load-

ing each day. The Berwind-White Coal Mining Company have not been able to coal the mail steamers in New York Harbor last week and this week. Most positive instructions should be issued and the arrangements carried out that equal to 500 cars will be at Scalp Level region each and every day before any attempt is made to supply cars to the mines on the Mountain, South Fork district or South Fork Railroad. Please advise if understood.' And under date of November 22nd, 1902, from J. M. Wallis to R. Pitcairn,
609 Pittsburg: 'Please give Berwind's mines at Scalp all the cars you have in the territory for to-morrow, cutting the other operations.' That this preference continued and that it was a preference that affected particularly the mines on the Mountain Division appears later in a telegram from G. W. Creighton, then superintendent at Altoona, to S. C. Long, superintendent at Pittsburg, in the following language: 'Our efforts this week in keeping Scalp supplied with cars have not been successful. Please renew the instructions to all parties interested that before placing cars for other operations on the Mountain or on the South Fork Railroad, equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day until further notice and it is important that sufficient cars should be placed early each morning so that all of the mines will have a supply to start with and there will be no danger of any operations being idle on account of not having cars. To protect ourselves on this arrangement I would be glad if you will arrange to accumulate and have standing over daily equal to 175 to 225 cars in addition to the 500 that are required for loading. This is absolutely necessary in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the East carried out. The only exception that should be made to this order is for the Dunlo drift mine to have sufficient cars daily to protect the N. Y. P. & N. supply coal order, which I think is 200 tons per day. Acknowledge receipt.' Said special orders were not rescinded during the period of action."

That cars greatly in excess of its aggregate rating were given to the Scalp Level Division during the period covered by the action is beyond dispute. It was not alleged that any mines in the division so favored shared in the excess other than the mines of the Berwind-White Company; nor was it averred that of those actually distributed to the Mountain Division the plaintiff company did not receive its ratable proportion. This was perhaps not so direct a way of showing how many cars in excess of their rating the Berwind-White Company received, but it was none the less certain; not only did it furnish a correct basis for calculation, but the Berwind-White Company being the only party preferred so far as the evidence shows, this is in itself a sufficient answer to the objection that plaintiff's allegata and probata did not agree.

The complaint that the court did not take into account the private or individual cars in determining the extent of the discrimination against the plaintiff introduces matter foreign to the issue in the case. The issue had regard to the cars owned by the
610 defendant company. The period of discrimination complained of antedated the decision in the cases of Interstate

Commerce Commission v. Illinois Central R. R., supra, where it was held to be the duty of the interstate carrier in making distribution of its cars in times of shortage to include in the computation private cars in addition to its own. In making its distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However general the practice, it was, as held in the case referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant company would set up its own disregard and violation of law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all shippers in the district as fair and equitable, with full knowledge of all facts, since so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied when it established the basis of distribution upon which all acted throughout the entire transaction. Apart from this, while proper deference to the Interstate Commerce Commission would require our State courts to regard the furnishing of private cars as a fair equivalent of the same number of company cars, the fact that such cars were furnished, as the pleadings stood in this case, would be purely a substantive matter of defence. If the facts were as here alleged by the defendant, it was its duty to establish them by evidence. It does not appear that in any of the
611 requests for findings the court was asked to derive from the evidence anything that would support the present contention. The point itself was not raised or even distantly referred to in the course of the trial, but was indicated first in an exception to the court's conclusion. We accept the learned trial judge's reasons for dismissing the exception as entirely sufficient. He says, among other things, with respect to the matter:

"Again, the kind, character and size of the individual cars placed either to the Mountain Division or to the South Fork and Scalp Level Divisions were scheduled in the case for which reason alone no equitable basis of calculation could have been made by the court. As shown in the testimony the favored shipper, viz: the Berwind-White Coal Mining Company, obtained from the defendant company as its own individual cars at least 1,000 steel cars counted as two in our calculation, while the testimony also shows that whatever of individual cars the plaintiff company had were of a lesser capacity. Manifestly, therefore, the court could not have made and cannot now make from any data in the case an equitable schedule of damages on the theory now for the first time presented in this exception."

It is further contended under this proposition that the cost per ton of mining the coal as it enters into the calculation of the plain-

tiff's damage is erroneous. A manifest error appears in the calculation submitted in support of this contention. The plaintiff's mines are there given a rated capacity of 47,476 cars, whereas the finding is that their rated capacity was 39,148 cars. That this difference seriously impairs the conclusion based thereon is manifest; to what extent exactly could be determined only by a calculation which we do not feel called upon to make. Still another contention is that the court erred in not taking into account the royalty per ton or net share of the net profits which under its agreement plaintiff would have had to pay to the lessor of its mines in determining the cost of production to the plaintiff. The thirteenth finding of the court is as follows:

"Thirteenth. That the evidence shows that the fair average cost of producing coal at the plaintiff's mines during the period of the action, including royalty, had they been treated by the defendant company with a fair distribution of cars, was one dollar and
612 ten cents per ton from April, 1902, to March 1903, inclusive, and one dollar and fifteen cents per ton from April, 1903 to March 1904, inclusive, and one dollar and twelve cents per ton for the period of the action thereafter."

This finding is directly contrary to what is here alleged. An appeal such as this brings up only questions of law on bills of exception to the rulings of the court; and its conclusions on the facts of the case are to be regarded in the same manner as a verdict of the jury: Gonser v. Smith, 115 Pa. 452.

We see nothing in the facts of this case that should exempt the defendant from its liability for the damages assessed against it for the delay in the settlement of the plaintiff's claim. The question of damages for delay in settlement of such cases is ordinarily for the jury under the evidence submitted. The court here discharging the function of the jury found the defendant in default in this regard without sufficient excuse on its part. We see no reason to interfere with that conclusion.

The final objection is to the allowance of plaintiff's amended statement. We are of opinion that the amendment introduced no new cause of action. The opinion of the learned trial judge fully sustains his action in that regard.

In what we have said all the assignments of error which have been brought to our attention in the argument submitted have been considered and passed upon. The assignments are overruled and the judgment is affirmed.

613 In the Supreme Court of Pennsylvania, 1912.

No. —.

PURITAN COAL COMPANY
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

And now, to wit, October 19, 1912, on motion of Thomas Patterson of counsel for The Pennsylvania Railroad Company, defendant

above named, it is ordered that the record in the above entitled case be held by the Prothonotary of this Court for such period as may be necessary, for the consideration by the Supreme Court of the United States of an application by the defendant above named for an appeal or writ of error from the judgment of this Court to the Supreme Court of the United States.

PER CURIAM.

Endorsement: 99 January T. 1912.—Puritan Coal Co. v. Penn. R. R. Co.—Order to hold Record.—Filed Oct. 21, 1912, in Supreme Court.

614 STATE OF PENNSYLVANIA,
Eastern District:

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Record in the above entitled cause, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Philadelphia, this 1st of November, A. D. 1912.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

615 I, D. Newlin Fell, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Alfred B. Allen was, at the time of signing the annexed attestation, and now is, Deputy Prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 7th day of December, one thousand nine hundred and twelve.

D. NEWLIN FELL.

I, Alfred B. Allen, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable D. Newlin Fell, by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the

Eastern District, at Philadelphia, this 7th day of December, one thousand nine hundred and twelve.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

ALFRED B. ALLEN,
Deputy Prothonotary.

616 In the Supreme Court of the United States, October Term, 1912.

No. 885.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
PURITAN COAL MINING COMPANY, Defendant in Error.

In Error to the Supreme Court of Pennsylvania.

Specification of Errors upon Which Plaintiff in Error Intends to Rely.

1. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its dismissal of the petition of the plaintiff in error to dismiss the action for want of jurisdiction of the trial Court to entertain the same.

2. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its refusal to find as requested in the following request presented to it by the plaintiff in error:

"The plaintiff is not entitled to recover because this court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the 'Interstate Commerce Acts,' in the Federal tribunals."

3. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its refusal to find as requested in the following request presented to it by the plaintiff in error:

"Under the law and the evidence the plaintiff is not entitled to recover."

617 4. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its affirmance of the following request presented to it by the defendant in error:

"That shipments by the plaintiff of its product which were sold f. o. b. cars at the mines, upon which the freight was paid by the consignees and destination entirely controlled by the consignees, constituted intrastate business, and not interstate business as between the plaintiff and defendant."

5. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its affirmance of the following request presented to it by the defendant in error:

"If by virtue of the undue and unreasonable discrimination practiced in this case the plaintiff suffered damage at the hands of the defendant, it is entitled to recover in this action on the amount of coal it could have sold and would have been able to ship delivered f. o. b. cars at mines, but for the said discrimination of the defendant."

6. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its refusal to find as requested in the following request presented to it by the plaintiff in error:

"As it appears from the evidence that the cars used by the plaintiff for its State shipments for deliveries of coal during the period of the action constituted a greater percentage of its mine rating than did the cars so used by the Berwind-White Coal Mining Company, the defendant has not been shown by the evidence to have been guilty of any unlawful discrimination cognizable in this action."

7. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its failure to take into account the private or individual cars, so-called, which were delivered to the defendant in error during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the Court found should have been allotted to the Region or district in which the defendant in error's mines were located.

8. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court the method adopted by it for ascertaining the number of cars which the defendant in error should have received, which said method is embodied in the following schedule prepared by the Court:

(Here follows table marked page 618.)

	Steel Cars required to make equal with Scalp Level.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalise with Scalp Level.	Long in Other Cars.
1902					
April	3106.5	2074.5	4149	2548	1207
May	3424.5	2277.5	4555	2745	1084
June	3212	1980	3960	3024	1038
July	3187.5	1936.5	3873	3074	1545
Aug	3161	1620	3240	3085	703
Sept	2787.5	1493.5	2987	3099	627
Oct	2579.5	1353.5	2707	2705	429
Nov	2467	1327	2654	2058.5	599.5
Dec	1989.5	1191.5	2383	2081.5	642.5
1903					
Jan	1892	1102	2204	1995	464
Feb	2168	1205	2410	1586	91
Mar	2921	951	1902	2337.5	713.5
Apr	2364	976	1952	2025.5	62.5
May	2009.5	1005.5	2011	2089.5	734.5
June	2191	853	1706	1933.5	750.5
July	2192.5	828.5	1657	1713	766
Aug	2357.5	768.5	1537	1250	625
Sept	2170.5	812.5	1625	1310.5	690.5
Oct	1783	925	1850	1565.5	861.5
Nov	2044.5	1031.5	2063	1440	676
Dec	2181	1132	2264	2069.5	743.5
1904					
Jan	1963	1206	2412	1345	710
Feb	2045.5	858.5	1717	1301	907
Mar	2237.5	1149.5	2299	2012.5	1022.5
Apr	2643	1636	3272	1536.5	612.5
May	2600	1331	2662	1649	122
June	2056.5	1129.5	2259	1217	383
July	2044.5	1268.5	2537	1351	851
Aug	1608.5	807.5	1615	1847.5	230.5
Sept	1449	703	1406	1901	115
Oct	1866	1198	2396	1771	437
Nov	1577	828	1856	1648.5	202.5
Dec	1314.5	835.5	1671	1534.5	X(56.5)
	75604.5	39895.5	79791	64850	20344.5

X Is short.

Cars ed ke with evel.	Short in Steel Cars	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalize with Scalp Level.	Long in Other Cars.	Net Shortage in cars (Steel as two).	Net Shortage in tons (Car 25 tons).	Puritan Distribution percentage for month as fixed by Dept.	Shortage in Puritan tonnage on acct. of car shortage.	Average selling price per ton.	Cost of production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss Penna. Delivery.	Total Loss Interstate Delivery.
6.5	2074.5	4149	2548	1207	2942	73550	8.2	6031.1	1.17	1.10	.07	422.18	78.23	21.77	330.27	91.91
4.5	2277.5	4555	2745	1084	3471	86775	8.1	7028.7	1.30	1.10	.20	1405.74	75.21	24.79	1057.26	348.48
2	1980	3960	3024	1038	2922	73050	8.1	5917.4	1.86	1.10	.76	4497.22	80.25	19.75	3609.02	888.20
7.5	1936.5	3873	3074	1545	2328	58200	8.1	4714.2	1.72	1.10	.62	3062.80	85.14	14.86	2607.67	455.13
1	1620	3240	3085	703	2537	63425	8.1	5137.4	1.47	1.10	.37	1900.84	88.86	11.14	1689.09	211.75
7.5	1493.5	2987	3099	627	2360	59000	7.8	4602	1.69	1.10	.59	2715.18	81.88	18.12	2223.19	491.99
9.5	1353.5	2707	2705	429	2278	56950	7.8	4442.1	2.54	1.10	1.44	6396.62	86.79	13.21	5551.63	844.99
7	1327	2654	2058.5	599.5	2054.5	51362.5	7.6	3903.5	2.28	1.10	1.18	4606.13	86.93	13.07	4004.11	602.02
9.5	1191.5	2383	2081.5	642.5	1740.5	43512.5	9.5	4133.6	2.80	1.10	1.70	7027.12	91.05	8.95	6398.19	628.93
2	1102	2204	1995	464	1740	43500	9.7	4219.5	3.22	1.10	2.12	8945.34	92.27	7.73	8253.96	691.38
8	1205	2410	1586	91	2319	57975	9.6	5565.6	2.09	1.10	.99	5509.94	88.46	11.54	4874.09	635.85
1	951	1902	2337.5	713.5	1188.5	29712.5	9.5	2822.6	1.59	1.10	.49	1383.07	87.95	12.05	1216.41	166.66
4	976	1952	2025.5	62.5	1889.5	47237.5	9.7	4582	1.57	1.15	.42	1924.44	91.98	8.11	1768.37	156.07
9.5	1005.5	2011	2089.5	734.5	1276.5	31912.5	8.5	2712.5	1.52	1.15	.37	1003.63	94.97	5.13	952.14	51.49
1	853	1706	1933.5	750.5	955.5	23887.5	8.5	2030.4	1.53	1.15	.38	771.55	90.64	9.36	699.33	72.22
2.5	828.5	1657	1713	766	891	22275	8.5	1893.3	1.55	1.15	.40	757.32	96.39	3.61	729.98	27.34
7.5	768.5	1537	1250	625	912	22800	8.5	1938.0	1.50	1.15	.35	678.30	87.73	12.27	595.07	83.23
0.5	812.5	1625	1310.5	690.5	934.5	23362.5	6.0	1401.7	1.50	1.15	.35	490.60	86.86	13.14	426.14	64.46
3	925	1850	1565.5	861.5	988.5	24712.5	5.7	1408.6	1.46	1.15	.31	436.67	85.90	14.10	375.10	61.57
4.5	1031.5	2063	1440	676	1387	34675	6.0	2080.5	1.48	1.15	.33	686.57	90.06	9.94	618.33	68.24
1	1132	2264	2069.5	743.5	1520.5	38012.5	6.0	2280.7	1.44	1.15	.29	661.40	93.97	6.03	621.52	39.88
3	1206	2412	1345	710	1702	42550	6.0	2553	1.43	1.15	.28	714.84	87.67	12.33	626.70	88.14
5.5	858.5	1717	1301	907	810	20250	6.0	1215	1.41	1.15	.26	315.90	73.88	26.12	233.39	82.51
7.5	1149.5	2299	2012.5	1022.5	1276.5	31912.5	6.0	1914.7	1.43	1.15	.28	536.12	81.15	18.85	435.05	101.06
3	1636	3272	1536.5	612.5	2659.5	66487.5	6.0	3989.2	1.31	1.15	.16	638.27	83.94	16.06	535.76	102.51
0	1331	2662	1649	122	2540	63500	6.9	3746.5	.....	.....	.....	.....	81.79	18.21		
6.5	1129.5	2259	1217	383	1876	46900	6.9	2777.1	.....	.....	.....	.....	93.89	6.11		
4.5	1268.5	2537	1351	851	1986	49650	5.6	2780.4	.....	.....	.....	.....	95.93	4.07		
8.5	807.5	1615	1847.5	230.5	1384.5	34612.5	5.6	1938.3	.....	.....	.....	.....	88.46	11.54		
9	703	1406	1901	115	1293	32325	5.6	1810.2	1.23	1.12	.11	199.12	80.95	19.05	161.19	37.93
6	1198	2396	1771	437	1959	48975	5.6	2742.6	1.23	1.12	.11	301.68	90.59	9.49	273.06	28.63
7	828	1856	1648.5	202.5	1653.5	41337.5	5.6	2314.9	1.23	1.12	.11	254.64	73.72	26.28	187.72	66.92
4.5	835.5	1671	1534.5	X(56.5)	1727.5	43187.5	5.6	2418.5	1.23	1.12	.11	266.04	30.48	1^ 52	204.11	51.93
4.5	39895.5	79791	64850	20344.5	59503.0	1487573.0	.....	109045.4	.....	.....	.....	58509.27	.....	.....	51257.85	7251.42

619 9. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its finding that the plaintiff had sustained damages exclusive of those resulting from delay to the amount of $51,257.85.

10. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its finding that the plaintiff was entitled to a judgment for the sum of $74,323.88.

FRANCIS I. GOWEN,
FREDERIC D. McKENNEY,
Att'ys for Plaintiff in Error.

620 The Pennsylvania Railroad Company,
Legal Department.

GENERAL OFFICE, BROAD STREET STATION,
PHILADELPHIA, *March* 6, 1913.

Francis I. Gowen, General Counsel.
George Stuart Patterson, General Solicitor.
Alan H. Strong, General Attorney.
Parker B. Prince, H. S. Prentiss Nichols, Stacy B. Lloyd, Ass't General Counsel.
Henry Wolf Bikle, Ass't General Solicitor.

In the Supreme Court of the United States, October Term, 1912.

No. 885.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
PURITAN COAL MINING COMPANY, Defendant in Error.

James H. McKenney, Esq., Clerk, Supreme Court, United States, Washington, D. C.

DEAR SIR: The errors upon which the plaintiff in error intends to rely are those which are set forth and embodied in 13 Specifications of Error which are attached hereto. The parts of the Record which are necessary for the consideration of these alleged errors are as follows:

1. Plaintiff's Statement of Claim.
2. Plaintiff's Amended Statement of Claim.
3. Objection of Defendant to Allowance of Amended Statement of Claim.
4. Opinion and Decree allowing Amended Statement of Claim.
5. Petition of Defendant to dismiss action for Want of Jurisdiction.
6. Answer of Plaintiff to Objection of Defendant to Dismiss Action for Want of Jurisdiction.
7. Opinion and Decree overruling Petition to Dismiss Action.

8. Agreement to Waive Jury Trial.

9. Following extract from Testimony, and following Exhibits.

"By Mr. GOWEN: We offer in evidence, if the Court please, the certified copy of the statement of claim filed in the cause instituted by the present plaintiff, in the Circuit Court of the United States for the Eastern District of Pennsylvania, to recover damages resulting from alleged discrimination in distribution of cars by defendant company during the same period covered by this action. The purpose being to show, in connection with the statements filed in the present case, the division of plaintiff's business as between State and Interstate according to their own statements of claim (Marked Defendant's Exhibit No. 9*c*.)

"By Mr. COLE: Is that the only purpose for which that is offered now?

"By Mr. GOWEN: That is the only purpose.

621 "By Mr. COLE: It is objected to as irrelevant and immaterial and incompetent. It is further objected to for the reason that at best the statement of the claim filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, as shown by the certificate, is an unsworn statement of someone other than the officers of the Puritan Coal Mining Company and cannot be held to bind the Puritan Coal Mining Company in this action as an admission.

"By the COURT: For the present purposes of this case we overrule the objection, admit the testimony and note exception for plaintiff and seal bill.

"By Mr. COLE: Then we have one question. It may be a little out of order.

"Q. Mr. Scott, have you had prepared under your direction and supervision a statement of the amount of coal that was billed during the period of this action strictly to Pennsylvania points and that that was billed by direction of the consignee to points outside of the State of Pennsylvania?

"A. Yes sir, I have.

"Q. You have?

"A. Yes sir, I have.

"We offer it now. (Marked Plaintiff's Exhibit No. 27.)

"By Mr. GOWEN: What is the purpose?

"By Mr. COLE: The purpose of it is an explanation of the two declarations filed in this case; that you made it competent by offering those declarations and made it incumbent upon us to make some explanation of it.

"By Mr. COLE:

"Q. I show you plaintiff's Exhibit No. 27 and I ask you if that is the statement?

"A. That is the statement.

"Q. Now, Mr. Scott, was the market conditions such during the period covered by this action that if you had been permitted to mine the coal that you claimed the right to mine in this case, that you could have disposed of said coal to Pennsylvania points of destination

and outside points in substantially the same ratio that you disposed of the coal that you did mine?

"A. Yes sir.

"Q. At the prices indicated by you in this case as the value of coal during that time?

622 "A. Yes sir.

"By Mr. GOWEN:

"Q. Mr. Scott, in the statement which has just been offered in evidence by your Counsel, and which is marked Plaintiff's Exhibit No. 27, you show that the tonnage which was billed by the Puritan Coal Mining Company for consignees to Pennsylvania points aggregated, as I understand, 88,602?

"A. I don't know the total.

"Q. Substantially those figures. 88,602, while the tonnage billed for consignees to points outside of Pennsylvania aggregated 407,413. Assuming the correctness of that addition of those figures, Mr. Scott, the tonnage billed to consignees within the State of Pennsylvania is somewhat less, slightly less than 18 per cent of the total?

"A. It would be less than 20 per cent, I see that. It is 88 and 407. A little less than 20 per cent.

"Q. Now on what do you base your statement?

"A. I made it up myself.

"Q. You misunderstand me. On what do you base your statement that any additional tonnage which you would have mined and shipped would have divided in the same way as between tonnage billed outside the State and tonnage billed within?

"A. I believe I could have sold it in practically the same proportions.

"Q. It is just your judgment or opinion?

"A. It is my judgment as to conditions.

"Q. Of how that tonnage would be divided?

"A. Yes sir.

"Q. Are there any facts which you have in mind which would tend to support that?

"A. Nothing further than I had salesmen traveling through Pennsylvania and also through New Jersey and he came in contact with business in both States that he could have gotten."

Defendant's Exhibit No. 9*c*.

Plaintiff's Exhibit No. 27.

10. Report of Facts and Law by the Judge sitting without a Jury.

11. Opinion of Court disposing of Exceptions filed by Plaintiff and Defendant to the Court's Report and Findings of Fact and Law, and Decree embodied therein.

12. Following Assignments of Error to Findings of Fact and Law and Judgment of Court: Nos. 2, 4, 5, 6, 7, 10, 11, 12, 19, 20, 21.

13. Opinion of the Supreme Court of Pennsylvania.

14. Proceedings subsequent to entry of judgment of Supreme Court of Pennsylvania.

Yours truly,

FRANCIS I. GOWEN,
For Plaintiff in Error.

V. H. Enc.

623 Now March 12, 1913, service is accepted for the Puritan Coal Mining Company the defendant in error of a copy of a letter dated the 6th instant addressed to the Clerk of the Supreme Court of the United States in which is set out parts of the record which are necessary for the consideration by the Supreme Court of the United States of alleged errors of the Supreme Court of Pennsylvania; and service is also accepted of a copy of the specifications of error as set out by the plaintiff in error the Pennsylvania Railroad Company in its appeal to the Supreme Court of the United States No. 885 October Term 1912; further service of the said papers is waived.

A. M. LIVERIGHT,
A. L. COLE,
Attorneys for Defendant in Error.

624 [Endorsed:] File No. 23,460. Supreme Court U. S., October Term, 1912. Term No. 885. The Pennsylvania Railroad Co., Pl'ff in Error, vs. Puritan Coal Mining Company. Specification by plaintiff in error of errors relied upon and designation of parts of record to be printed, with proof of service of same. See McKenney letter of M'c'h 13, '13. Filed March 13, 1913.

625 Law Offices Krebs & Liveright,
Clearfield, Pa.
Both Telephones.

David L. Krebs.
A. M. Liveright.
James K. Horton.

In the Supreme Court of the United States, October Term, 1912.

#885.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,
vs.
PURITAN COAL MINING CO., Defendant in Error.

MAY 28, 1913.

James H. McKenney, Esq., Clerk of the United States Supreme Court, Washington, D. C.

DEAR SIR: Counsel for the plaintiff in error in the above stated case served on me a statement of the errors on which he intended to rely, with the parts of the record that he deemed necessary for consideration thereof. The enclosed transcript repersents the additional parts of the record which Counsel for the defendant in error think material for the consideration of the cause, and you are respectfully requested to print the same. Said transcript consists of 40 typewritten sheets or pages of legal cap.

Very truly yours,

A. M. LIVERIGHT,
Of Counsel for Puritan Coal Mining Co.

626 GEORGE E. SCOTT called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

"Q. Where do you live?
A. I live in Philadelphia.
Q. Were you connected with the Puritan Coal Mining Company?
A. I was.
Q. Between what years?
A. From the time of its organization till 1908, about December, 1908.
Q. Give the date of the organization?
A. I think it was in 1889 it was first organized as the Scott Coal Mining Company, and afterwards the charter was changed to the Puritan Coal Mining Company.
Q. When did the name Puritan Coal Mining Company go into effect?
A. I haven't got the paper, I couldn't tell what year it was. About 1895 I should think, 1893 or 1895.
Q. Between 1900 and 1905 what position did you hold with the Puritan Coal Mining Company?
A. I was treasurer and manager.
Q. What office did you hold?
A. I was one of the Board of Directors and manager.
Q. You say you were treasurer?
A. I was treasurer of it.
Q. Were you Vice-President at any time?
A. I was Vice-President later. I think I was Vice-President one time, I can't tell what year.
Q. Between April, 1902, and December, 1904, you were manager all the time and treasurer as well?
A. Yes sir.
Q. Where are the mines of the Puritan Coal Mining Company?
A. They are in Cambria County, on what is known as Martin's Branch of the Pennsylvania Railroad.
Q. Where does that branch connect with the main line of the Pennsylvania Railroad?
A. Portage.
Q. How far are the Puritan mines from Portage?
A. About three miles.
Q. How many of them are there?
A. There were three. At one time we had four there. We had 1, 2, 3, and 5, but the lease, expired on one. We were operating 1, 3 and 5."

* * * * * * *

627 By Mr. LIVERIGHT:

"Q. Now Mr. Scott, are you familiar with car supply conditions as they obtained at the Puritan mines in 1902, 1903 and 1904?
A. In the way that I get my reports from the mine.
Q. Your office was in Philadelphia was it?

A. Yes sir.
Q. How often did you get a report from the mine?
A. Every day.
Q. State whether or not you had a car supply up to your capacity to load coal?
A. We had not.
Q. How was the car supply at the different mines of your ownership as compared with one another?

By Mr. O'LAUGHLIN: We object to this.

By Mr. LIVERIGHT:

Q. Of these three mines that is to say which mine was best supplied?
A. Well we had a number of individual cars which we ran entirely to our No. 1 mine and that mine got the best supply of cars by far.
Q. By the individual cars, you say?
A. Yes sir.
Q. Which got the next best supply?
A. Well the other two mines fared about alike.

By Mr. O'LAUGHLIN:

Q. Give us your No. 1?
A. We ran all our individual cars with No. 1 mine.

By Mr. LIVERIGHT:

Q. Why was that?
A. Because it was a shaft and in order to reduce the expense as much as possible it would be necessary for a continuous run as near as possible.
Q. State whether or not there was a constant expense there?
A. Every hour.
Q. Did that apply to the other mines?
A. It did not, excepting we had to pump at No. 3 mine a few hours every day. The other place we had to pump every hour.
Q. Did any of your individual cars *to* to No. 3 and 5?
A. There may occasionally have been a few, but we tried to confine them to No. 1.
Q. On what did No. 3 and 5 depend for their car supply?
A. The regular Pennsylvania cars.
Q. What do you mean by Pennsylvania cars?
A. System cars we call them.
Q. Can you explain that further, what system cars mean?
A. It means not individuals and not assigned cars. Cars that were operated by the Pennsylvania Railroad of their own.
Q. Cars operated by the Pennsylvania Railroad Company indiscriminately for the use of any operator?
A. Yes sir.
628 Q. Do you know how many of them there were on the system?

A. I do not.

Q. Or how many there were on the division?

A. No sir.

Q. Did you get a sufficient supply of system cars aat Nos. 1, 3 or 5 to keep your operations going?

A. No sir.

Q. How much of the time were you able to keep them going?

A. Well at No. 1 I suppose would have pretty close on to two thirds time, but we didn't push it any. No. 3 and No. 5 hardly had more than half time.

Q. How was that two thirds time made up, partly *or* individual and partly of system cars?

A. The system cars were very few, almost absolutely individual cars.

Q. To the west of the Martin's Branch what is the next branch or division of the Pennsylvania Railroad Company running south to the coal mines?

A. It is the South Fork. Windber and South Fork.

Q. What are the principal mines on that Branch?

A. Well the first mines on that branch are the Stineman mines. After that you get up to the neighborhood of Dunlo and Beaver Branch. At Dunlo are located the Henrietta, the Logan, and on Beaver Branch are a number of mines, I think the Altman, the Logan have a mine in there, the Pennsylvania Coal & Coke Company.

Q. Where are the Berwind mines situated?

A. They are the same branch running across from Lowett.

Q. That is to say they are further south on the South Fork and Scalp Level Branch?

A. Yes sir.

Q. I neglected to ask you whether Martin's Branch ran southwardly from the main line?

A. It does.

Q. What mines of the Berwind White Coal Mining Company are situated on the Scalp Level Branch?

A. That is more than I can tell. I know they have quite a number over there, but I don't know what mines.

Q. Do you know what kind of car supply as to the character of cars they have. I don't ask for the number but kind of cars?

A. I don't know the number. I know they were getting both individuals and system cars.

Q. Do you know of your own knowledge how they fared in proportion to the Puritan Coal Mining Company's mines?

A. As far as I can learn from data I think they fared better.

Q. Do you know how much better?

A. Considerably better.

Q. Are you able to state from your own knowledge what proportion of their supply was individual cars and what system cars?

A. No sir.

Q. Do you know the capacities of their mines?

A. No, I do not.

Q. Do you know the capacities of your own mines during the entire period of the action?

A. Yes.

Q. Was it constant at 900 tons for No. 1 or some change in it?

A. I don't think there was any change in No. 1.

Q. Did No. 3 remain the same?

A. I don't think any change there either at No. 3 or No. 5.

Q. You think they were all practically the same?

A. They were rated by the railroad with the same capacity
629 right along.

Q. You have given their capacities. How were they rated by the Railroad Company?

A. They were rated by the figures I have given you. No. 1 was rated at 900 tons a day, No. 3 at 500 tons a day and No. 5 either 300 or 500, I am not sure which.

Q. If there was any change made in t-ose ratings by the Railroad Company, were you notified of it?

A. Never.

Q. Now you say that the Berwind mines were supplied better with cars than your mines. Did you ever bring that to the attention of the Railroad Company?

A. I certainly did.

Q. How?

A. By going and seeing them.

Q. Where?

A. Broad Street Station.

Q. Did you ever write to them.

A. Occasionally, not very often at Broad Street. My office was within a block of the station and I would go right over.

Q. How often did you go to the Broad Street Station with reference to these matters?

A. That is hard to tell.

Q. When did you go?

A. Every year.

Q. Did you go more than once a year?

A. Yes sir.

Q. Whom did you see?

A. I would see the various men in charge of transportation.

Q. Name them?

A. Mr. Trump, Mr. Hutchinson, Mr. Atterbury, and I think I saw Mr. Patterson once or twice.

Q. Did you see Mr. Prevost?

A. Yes sir.

Q. Who was Mr. Trump?

A. Mr. Trump was superintendent of transportation. Mr. Hutchinson at one time was superintendent of transportation but afterwards general manager, and I think during this time he was general manager, and Mr. Patterson was superintendent of freight transportation, and Mr. Atterbury was general manager.

Q. Who was Mr. Prevost?

A. Mr. Prevost was one of the Vice-Presidents.

Q. What did Mr. Atterbury tell you?
A. Well he would promise to look up the situation and see what it was and see whether anything could be done.
Q. Did he ever remedy the situation?
A. Nothing was ever done to my knowledge.
Q. What — Mr. Trump say?
A. Well we would get all kinds of answers.
Q. Did he ever remedy the situation?
A. Not materially at all.
Q. What did any of the other officers say?
A. Well I have often been told, if I said I got one car, I was lucky to get that.
Q. *You* told you that?
A. I think Mr. McCully told me that. That is the chief clerk of the Transportation Department.
Q. What gave rise to that remark of his?
A. Well he wanted to be rather jolly I think.
Q. Had you talked to him about getting one car?
630 A. Yes, repeatedly.
Q. Did you on that day tell him you only got one car or some particular day?
A. Yes, I did. I saw him a number of times.
Q. What did he say?
A. His usual reply was we were getting all that were available for distribution.
Q. Did he tell you what available meant?
A. Never did.
Q. Did any of these officers tell you what available meant?
A. Never.
Q. Did you bring to their attention anything about the alleged advantage that was being enjoyed by the Berwind White mines?
A. I certainly did.
Q. To whose attention did you call that?
A. I called it to Mr. Trump's I think.
Q. Did you call it to the attention of these other men?
A. Some of them I may have. I don't recall who in particular.
Q. What did they say about it?
A. They never had anything to say about that. They never made any reply.
Q. Sir?
A. They never had anything to say.
Q. Did you have an interview with Mr. Trump, in the presence of Mr. John Scott, Jr., about car supply of the Puritan and Berwind Mines?
A. I did.
Q. When was that?
A. That was about somewhere in the spring I think of 1903.
Q. Where?
A. In Broad Street Station.
Q. At his office?

A. In his office.

Q. What was the conversation between you?

A. Soon after we went in the office some word of the day was spoken, and Mr. Trump said, gentlemen, there is no use of your bringing up the question of the Berwind business because we are determined to protect the Berwind business at all hazards.

Q. Had you said anything to Mr. Trump?

A. Not one word.

Q. About the Berwind business?

A. Not one word in that interview.

Q. Was that the opening remark when you came into his door?

A. That was practically the opening remark, and then the remark was made by my brother that it was a remarkable thing for an official of the Pennsylvania Railroad to make such a statement, and he said they knew the hazards they were taking and they were prepared to meet them.

Q. Was the question of the car supply discussed any further?

A. It was.

Q. Give the conversation?

A. The conversation was on the basis of demanding an equitable distribution of all the cars they had.

Q. Was the subject of special orders for cars introduced?

A. No sir, we did not ask for special orders.

Q. Was it introduced?

A. It wasn't introduced at all.

Q. Was any reference made by you or your brother to special orders for Berwinds?

A. Not that I recall, because with Mr. Trump's statement of the determination to protect the Berwind business I don't know that we brought that up.

Q. Who had the conversation there with Trump?

631 A. My brother.

Q. State whether or not at various times previous to this you had charged the Railroad Company officers with favoring the Berwind White Coal Mining Company?

A. I certainly had.

Q. Whom had you made those statements to?

A. Whoever was superintendent of transportation or the general manager.

Q. Did they make any reply to the charge?

A. They never had any defense to make to it and ignored it.

Q. As nearly as you can, state how many times you went to the offices of the Pennsylvania Railroad Company and made complaint about the car supply accorded the Puritan Coal Mining Company in 1902, 1903 and 1904?

A. I must have gone there from 20 to 30 times each year. The trouble was if you would go to the Transportation Department you never could get to see the superintendent of transportation. You could sit in the outside room and enjoy yourself for a few hours and find he had gone into some other office in the building.

Q. How did you happen to go to Mr. Trump in 1903?

A. A letter had been written to Mr. Prevost complainant about the situation and he requested we go to Mr. Trump.
Q. And that is when you got that reply?
A. Yes sir.
Q. Did you after that go to the offices of the Pennsylvania Railroad to complain about car supply?
A. Yes. I don't think I went as frequently as when I got that answer.
Q. Do you have any letter press copies of the letters you sent the Railroad Company on the subject?
A. I have some of them. They are over in the office.
Q. I wish you would send for them.

We call on the defendant to produce telegrams that we requested in a notice served this morning. We have copies of them.

By Mr. O'LAUGHLIN: If Mr. Scott says these are copies, we are satisfied.

By Mr. LIVERIGHT:

Q. Who was the general superintendent of the Pennsylvania Railroad at Altoona?
A. When?
Q. 1902?
A. I am inclined to think Mr. Wallis was superintendent then.
Q. J. M. Wallis?
A. J. M. Wallis.
Q. State whether under date of August 1st, 1902, you sent a telegram to Mr. Wallis?
A. I did.
Q. Is the copy that you have before you a true copy of the one you wired him?
A. It is.

We offer telegram of August 1, 1902. (Marked Plaintiff's Exhibit No. 1.)

Q. Is the copy of telegram of August 8th, 1902, to J. M. Wallis, general superintendent, a true and correct copy of the message you sent him?
632 A. Yes sir, it is. (Marked Plaintiff's Exhibit No. 2.)
Q. Is the copy of the telegram of September 8th, 1902, to Mr. Wallis a true and correct copy of the one you sent him?
A. It is. (Marked Plaintiff's Exhibit No. 3.)
Q. Refer to the copy of the one of February 13th, 1903?
A. That is to Mr. Creighton. (Marked Plaintiff's Exhibit No. 4.)
Q. Is that a true copy of the message you sent?
A. It is.

By the COURT:

Q. The other three were to Wallis, were they?
A. Yes sir.

By Mr. LIVERIGHT:

Q. Under date of March 27th, 1903, have you a copy of message sent to S. C. Long?

A. That is a correct copy. (Marked Plaintiff's Exhibit No. 5.)

Q. Message of March 28th, 1903, to Mr. Long, do you have a copy in your book and is it a true copy?

A. March 28th, that is correct. (Marked Plaintiff's Exhibit No. 6.)

Q. May 2nd, 1903, did you wire Mr. Long and do you have a correct copy of the message?

A. That is correct. (Marked Plaintiff's Exhibit No. 7.)

Q. May 9th, 1903, did you wire Mr. Creighton, and do you have a true copy of the message?

A. That is correct. (Marked Plaintiff's Exhibit No. 8.)

By Mr. O'LAUGHLIN:

Q. Are these true and correct copies of actual telegrams sent by you to these people?

A. Yes sir.

Q. And these copies in this letter book are correct copies of it?

A. They are correct copies.

By Mr. LIVERIGHT:

Q. Are they in your own handwriting?

A. They are in my own handwriting.

By Mr. O'LAUGHLIN:

Q. They are in your handwriting?

A. Yes sir.

By Mr. LIVERIGHT: We offer these telegrams.

Q. Are all these telegrams signed by the Puritan Coal Mining Company?

A. All that you call my attention to. There are one or two there in the book that are not signed by the Puritan Coal Mining Company.

Q. All to which I directed your attention are signed by you for the Puritan Coal Mining Company?

A. They are not signed by me. They are signed with a stamp, but it is my writing.

Q. The reason I ask this question is that the book does not contain a perfect imprint of the name of the sender and I want to get it on the record. These are the messages emanating from the
633 Puritan Coal Mining Company, is that correct?

A. Yes sir, the signature with a rubber stamp.

"August 1, 1902, J. M. Wallis, General Superintendent, Penna. Railroad, Altoona, Pa. Only five Pennsylvania cars at Puritan today. All our contracts are suffering. Please help us.

PURITAN COAL MINING COMPANY."

"August 8th, 1902. J. M. Wallis, General Superintendent P. R. R. Altoona, Pa. Nothing but individual cars at Puritan for several days. We ought to be entitled to some steel cars when they are going to others."

"September 8th, 1902. J. M. Wallis, General Superintendent P. R. R. Altoona. Seven cars at Puritan Mines this morning. Can't you afford some relief."

"February 13th, 1903. G. W. Creighton, General Superintendent Pennsylvania R. R. Altoona, Pa. Mr. Trump's office advised us yesterday there should be good run of cars today. We have five Pennsylvania cars and not one Puritan or Baker Whitely at Martin's Branch. Please advise us fully as we want information for use at Broad Street. Will you please wire them also direct."

"March 27th, 1903. S. C. Long, Superintendent Pennsylvania Railroad, Pittsburg, Pa. We are informed that some sixteen individual cars are at Portage. Can't these cars be placed. We will be idle Saturday if this is not done. These cars have been at Portage since early this morning, and engine has made several trips past our mines."

"March 28th, 1903. S. C. Long, Superintendent Pennsylvania Railroad, Pittsburg Pa. Individual cars were not placed on Martin's Branch. Two mines are idle."

"May 2nd, 1903. S. C. Long, Superintendent, P. R. R. Pittsburg, Pa. Some individual cars placed Portage today, but no Pennsylvania. Some Pennsylvania cars at other mines on Martin's Branch."

"May 9th, 1903. G. W. Creighton, General Superintendent, Pennsylvania Railroad, Altoona, Pa. Not one Pennsylvania car at mines Martin's Branch today. Can't you favor with some steel cars."

By Mr. LIVERIGHT:

Q. Mr. Scott, I show you letter press copy of letter dated October 30th, 1902; also letter press copy of letter dated October 31st, 1902; the first addressed to M. Trump, General Superintendent Transportation, the second to S. M. Prevost, Third Vice President of Pennsylvania Railroad. Kindly examine and see whether those are correct copies of letters sent by you?

A. They are correct.

We offer these letters in evidence.

NOVEMBER 30TH, 1902.

"M. Trump, Esq., General Superintendent Transportation, Pennsylvania Railroad Company, Philadelphia.

DEAR SIR: We must call your attention to Puritan Coal Mining Company car No. 542 which was dumped at Trenton on October 3rd, and since that time has either been permitted to lie on the siding at Trenton or somewhere near there, as it has not been returned
634 to our mines, and certainly twenty six days should permit delivery back at our mines. We would also call your attention to the fact that coal is taken from our mines, and is continually

left standing between mines and Altoona scales as much as a week and ten days at a time, while coal from the west of us is taken through on almost fast freight time. We certainly feel that our business has the same right to the attention of the transportation department as any shipper on the road.

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*"

OCTOBER 31, 1902.

"S. M. Prevost, Third Vice-President Pennsylvania Railroad Company.

DEAR SIR: We write to ask if we cannot have some relief on the matter of car supply for contracts that we have had for years. The supply of cars at our Puritan mines has been largely Baker Whitely cars, and we are loading them under contract and cannot use them for our own business. We have a number of our customers, to whom we are under contract, that have shut down their works repeatedly for lack of coal. We are powerless to help them. At our Puritan mines on Martin's Branch, w-ere we have a loading capacity of 1,200 to 1,300 tons a day, and where the car rating is 56 cars a day, for the first ten days in October we received 33 Pennsylvania cars. This is counting steel cars two cars. We have orders for shipments to Boston for parties that we have been shipping coal for several years, and contracts in New York by water, but it is impossible with a supply of three to five cars a day to take care of any business of any amount. The contracts that we have, and which we have been using our best efforts to fill, are as binding and obligatory to us as any shippers on the Pennsylvania road, and we feel that we should have some support from the road that our mines are located on for the fulfillment of these contracts.

With greatest respect, we remain,

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*"

Q. Mr. Scott, I direct your attention to letters a- follows, Page 11, under date of December 4th, 1902, to J. M. Wallis; page 12, December 4th, 1902, to S. M. Prevost; page 92, December 11, 1902, to S. M. Prevost; page 154, December 15th, 1902 to M. Trump; page 231, December 19, 1902, to J. M. Wallis; page 245, December 22nd, 1902, to M. Trump; page 437, January 6th, 1903, to S. M. Prevost. State whether or not they are true and correct letter press copies of letters written and signed by you, addressed to the various officers of the Pennsylvania Railroad Company?

A. They are.

We offer these letters.

By Mr. O'LAUGHLIN:

Q. Were these mailed to these gentlemen to whom they are addressed?

A. Yes sir.

635 Q. From your office?

A. From my office in Philadelphia.

Q. Sent by mail, not messenger?

A. No, sent by mail.

Q. These and the two preceding ones were all mailed?

A. All mailed.

Q. What do you do if they are not mailed when you have already done this far?

A. If it was to Altoona I couldn't carry it up there. It is mailed every time though. It is the rarest thing I ever sent any letter over there by messenger.

Q. If it got this far and you didn't mail them, what would you do?

A. I never copied any letters in my book and destroyed them. I always let them go and sent them out.

By Mr. LIVERIGHT:

DECEMBER 4TH, 1902.

"J. M. Wallis, Esq., General Superintendent Penna. R. R. Co., Altoona, Pa.

DEAR SIR: On December we took charge of what is called the Ivy Ridge Mine on Martin's Branch, operated by Baltzell Coal Company. On December 1st, Mr. Baltzell advises us that there was one Steel, one Erie, four D. L. & W. and one Central Railroad of New Jersey car placed at this mine for his account. There were also three D. L. & W. and two Lehigh Valley cars loaded on Monday, which has been placed at this mine on Saturday of the previous week for Mr. Baltzell. We have been making requisition daily for months for foreign cars, such as described above, and we have not been able to get any, still the records at this mine show almost daily receipts of just such class of cars as we asked for, but failed to receive. Mr. Baltzell's as well as Mr. Steel's office, advise us that these foreign cars all come carded to this mine. It is the case that we have repeatedly asked Mr. Trump's office, and they have as often declined to allow us to have any foreign cars carded to us at any of our mines, and we write to ask what peculiar circumstances there are that this mine under Mr. Baltzell's management could receive such cars when other shippers cannot receive them at all. We might add that we are sending a copy of this letter to Mr. Prevost, as we are most anxious to know why other people on Martin's Branch can and do receive foreign cars continually while we are not permitted to have any at all.

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*

By Mr. COWEN:

Q. There is a reference there to the Ivy Ridge?

A. Yes sir.

Q. Is that your No. 3?

A. No, No. 5.

636 By Mr. LIVERIGHT:

"DECEMBER 4TH, 1902.

S. M. Prevost, Esq., Third Vice-President, Pennsylvania Railroad Company, Philadelphia.

DEAR SIR: Herewith enclosed find copy of letter which we have written to J. M. Wallis, General Superintendent at Altoona. We have a record of the initials and car numbers of these foreign cars that have been placed at the Ivy Ridge Mine, and we would like some reason from Mr. Wallis why Mr. Baltzell can be continually furnished with foreign cars, and *had* has not been able to furnish us any for several months.

Respectfully yours,

PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

"DECEMBER 11TH, 1902.

S. M. Prevost, Esq., Third Vice-President, Pennsylvania Railroad Company, Philadelphia.

DEAR SIR: It is with a great deal — regret and reluctance that we herewith enclose letter from our superintendent under date of yesterday, giving some information which is exceedingly unpleasant to us. This is in the fact of a telegram from Mr. Trump to Mr. Wallis on Tuesday, the 9th. The present situation really leaves us one of three to take, that is, either to buy up all the train conductors and dispatchers on the western division, have a law suit, or go out of business. We do not care to retire from business, neither do we desire litigation, and furthermore we do not want to be a party to the demoralized condition of affairs of bidding for men's dishonesty. The situation is almost appalling to us, and it is a most serious thing for us to consider which of the three positions we will have to assume. We herewith enclose for your inspection a statement of distribution at our mines on Martin's Branch for the present month, as well as distribution at Pennsylvania Bituminous Coal Company's, not from the report on file in General Superintendent Trump's office, but from count of cars placed on the sidings.

Respectfully yours,

PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

By Mr. LIVERIGHT:

Q. Mr. Scott, in connection with this letter I have just read, the one to Mr. Prevost, the Third Vice President, in which you refer to a statement of distribution from count placed on the sidings and compare it with the report on file in the General Superintendent Trump's office. State whether or not such a comparison was made?

637 A. It must have been or I wouldn't have made the statement.

Q. Do you know whether they tallied?
A. They couldn't have agreed.
Q. Do you know or now remember how they disagreed?
A. I am not clear on that, no. But they could not have agreed. That was unus-al*ly* though.
Q. Did you have occasion frequently to make comparison with the records on file in Trump's office and with the actual distribution?
A. Yes sir, at my own mines.
Q. In what respect was there any discrepancy?
A. It varied one way or the other, and the total month wouldn't show up the same at all.
Q. That is to say the total of cars received by you as shown by your records was different from that shown by the Pennsylvania Railroad Company records?
A. Yes sir.
Q. State whether or not your records were correct?
A. My records were correct as reported from the clerk at the mines and they account for every car they report.
Q. Did they tally or coincide with the car shipments shown by your sales books?
A. Yes sir.

"DECEMBER 15TH, 1902.

M. Trump, Esq., General Superintendent Transportation, Pennsylvania Railroad Company, Philadelphia.

DEAR SIR: May we call your attention to our very pleasant interview on Tuesday last, and your instructions to Mr. Wallis about placing cars at our Puritan mines for the electric light companies of Baltimore and our own business. We would also call your attention to the fact that since that time we have received three Puritan Coal Mining Company's cars and four steel cars that can be used for our contracts on the track of the Pennsylvania Railroad. May we ask if there cannot be some improvement on this, as per your instructions to Mr. Wallis.

Respectfully yours,
PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

Q. What interview do you refer to in this letter?
A. I don't recall that at all.
Q. Did you have numerous interviews with Mr. Trump?
A. Oh yes, as often as I could get to see him.
Q. But you can't identify this particular interview?
A. No, I can't.
Q. Do you recall what promise he made at this time?
A. No.

638 "DECEMBER 19TH, 1902.

J. M. Wallis, Esq., General Superintendent, Pennsylvania Railroad Company, Altoona, Pa.

DEAR SIR: It is now seventeen days that we have had control of the coke ovens at the Ivy Ridge Mines on Martin's Branch and we have made requisitions daily for either coke or box cars for loading coke, and up to this time have not been able to receive a single car. There have however been placed at this siding five coke cars on account of the Baltzell Coal Company which we loaded. Will you kindly advise us if there is any prospect whatever for furnishing something on our requisitions for these cars.

Respectfully yours,

PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

"DECEMBER 22ND, 1902.

M. Trump, Esq., General Superintendent Transportation, Pennsylvania Railroad Company.

DEAR SIR: We are in receipt of yours of the 19th, enclosing reply of Mr. Wallis in reference to supply of cars at the Ivy Ridge Mine, and would say that we have been making requisition for cars for months. We hope this requisition on Thursday will accomplish some good results.

Respectfully yours,

PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

"JANUARY 6TH, 1903.

S. M. Prevost, Esq., Third Vice-President, Pennsylvania Railroad Company, Philadelphia.

DEAR SIR: Herewith enclose- we hand you copy of distribution slip of cars on Martin's Branch for yesterday, January 5th, and you will note that Puritan No. 5 and Puritan No. 3 mines are entirely omitted. We understand this is the sheet that is given to the conductor to make the distribution from, and why these two mines should be set to one side, and others having a capacity of only one half as much should be given five steel cars is beyond our comprehension. We would like very much if you could take this up and advise us something on the subject, as we do not care to be punished in this way.

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*"

639 Q. Do you recall whether you ever got any reply from Mr. Prevost or anybody else representing the Pennsylvania Railroad Company to your letter of January 6th, wherein you call attention to the omission of your mines and direct attention further to the fact that others having half your capacity are given five steel cars?

A. I don't think I got any letter. I have no recollection of it at all. About five times out of ten those letters would never be answered. We would never hear a word from them. The Railroad wouldn't make any reply at all.

Q. I direct your attention to letter of July 30th, 1903, from Puritan Coal Mining Company to R. M. Patterson, Superintendent of Freight Transportation, page 68 of copy book No. 61. State whether that is a true and correct copy of the original that was mailed to the party addressed?

A. Yes sir, that is a correct copy.

We offer this letter.

Q. It is a letter press copy?

A. Yes sir.

"JULY 30TH, 1903.

Mr. R. M. Patterson, Superintendent Freight Transportation, Pennsylvania Railroad Company, Broad Street Station, Philadelphia.

DEAR SIR: We have been endeavoring in vain for some week or ten days to get some coal forward to the Empire Manufacturing Company, at Trenton, whose contract we have for their coal supply. We herewith enclose some correspondence from them during the month of July, which will show the condition of affairs at this plant, and would ask if you cannot see your way clear to help these people out of their dilemma. We might add that we must decline to take any other person's coal to keep this plant supplied, neither do we want Company coal, but we do want to carry out our contract with these people to supply them with South Fork coal.

Respectfully yours,

PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

Q. I direct your attention to letter press copy of letter dated November 2nd, 1903, to David Steel, Esq., Assistant Train Master, by the Puritan Coal Mining Company. Is that a true and correct copy of the original mailed to the person addressed at the head of the letter?

A. It is.

"NOVEMBER 2ND, 1903.

David Steel, Esq., Assistant Train Master, P. R. R. Co., Altoona, Pa.

DEAR SIR: Our people at the Martin's Branch mines in-
640 form us that they were compelled to shut down on account of not having sufficient cars to last them until noon. It seems the train coming to our Branch brought up cars this morning for all the mines above us*t*, but left us sadly in the lurch, and it was 2:30 this afternoon before a single car was placed on our siding. We understand that cars were placed at the other mines earlier in the day. Will you please advise us if it is the instruc-

tions of Mr. Long that we are to receive the last consideration on the Branch.

Awaiting reply,

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*"

Q. I direct your attention to letter press copy of letter dated November 21st, 1904, at page 384 of letter book 71, and ask you whether that is a true and correct copy of the original mailed to the person addressed?

A. It is.

"NOVEMBER 21ST, 1904.

S. C. Long, Esq., Superintendent Pennsylvania R. R. Co., Pittsburg.

DEAR SIR: We are advised by our mines on Martin's Branch that again today they are idle on account of no cars. This is getting to be a regular thing for Monday, when there is a good supply of cars everywhere. The facts in the case, cars do not reach our mines in time to permit us to work, the train having reached the Puritan and cars placed about half past ten. It is impossible for us to hold our men three and a half and sometimes as much as six hours, and suffer the loss of paying them wages all the time they are idle waiting on the train. We wish you could see your way clear some how to help us out of the difficulty, so we can at least have enough cars on hand Monday morning to keep us working until such time as the train will arrive. Can you not take it up and see if there is not some way to offer us relief, and much oblige.

Respectfully yours,

PURITAN COAL MINING COMPANY.
GEORGE E. SCOTT, *Manager.*"

Q. I direct your attention to the following letters, being letter press copies in copy book No. 72, at page 83, letter of December 15th, 1904, to M. Trump, Esq., General Superintendent Transportation, P. R. R. Company; at page 114, letter of December 19th, 1904, to M. Trump, Esq., General Superintendent Transportation P. R. R.; at page 123 letter of December 21st, 1904, to M. Trump, Esq., and ask you whether they are true and correct copies of the originals mailed to the persons to whom addressed?

A. They are.

We offer these letters.

641 "DECEMBER 15, 1904.

M. Trump, Esq., General Superintendent Transportation, P. R. R. Company, Philadelphia, Pa.:

DEAR SIR: We are today advised by a party on the Pennsylvania & Northwestern Railroad that he yesterday saw six or eight of our steel cars going north by the P. & N. W. Railroad. We must decidedly protest against this treatment, as we have not received at

Puritan but thirty four Pennsylvania cars during the whole month of December up to and including the 15th, and nothing but individuals on seven days. At South Fork we worked three days last week and this week have been idle two days. So far as excuses of not being able to get cars through the yards and so on, we cannot recognize them, as other people's individual cars are not being delivered to us, and why ours should be taken to take care of your preference trade is only another evidence of the unlawful discrimination existing on the Pennsylvania Railroad, and which your company will surely have to settle for. We are mailing a copy of this letter to Mr. Prevost.

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*"

Q. What do you mean by individual cars of the Puritan Coal Mining Company not being delivered to them but going elsewhere?

A. I meant they were being taken empty to some point out on the Pennsylvania & Northwestern Railroad.

Q. Do you know of that happening?

A. From that letter someone reported seeing them.

Q. State whether or not you got repair bills for your cars that had been shipped to points other than those to which you directed them consigned?

A. I did.

Q. To what points?

A. I got repair bills from Pitcairn, away out at Pittsburg, and never shipped anything there. I got a repair bill from cars down on the Baltimore & Ohio Railroad.

Q. Did you ever ship coal there?

A. Never.

Q. Did you ever give authority to the Pennsylvania Railroad to send your individual cars to these points?

A. Never did.

Q. Did you ever get individual cars of other persons in place of those?

A. I never did.

Q. I hand you a letter dated December 16th, 1904, and ask you what that is?

A. That is a reply to the letter.

Q. Is that a reply to the letter I have just read?

A. That is a reply to that letter.

We offer it to show the answer.

Letter-head of Pennsylvania Railroad Company.

"PHILADELPHIA, *December* 16, 1904.

Puritan Coal Mining Company, George E. Scott, Manager, No. 26 South 15th Street:

642 DEAR SIR: I have referred your letter of the 15th inst. in regard to the diversion of your individual cars to our General Manager, Mr. W. W. Atterbury.

Yours truly,

S. M. PREVOST,
Third Vice-President.

Q. What other recognition or reply did you get to your letter of December 15th, 1904?

A. I don't know. I think if you refer to the letter following there is some reference to it. I don't recall any further reply.

"DECEMBER 19TH, 1904.

M. Trump, Esq., General Superintendent Transportation, P. R. R., Philadelphia:

DEAR SIR: We beg to advise you that at our Martin's Branch mine Puritan Nos. 1 and 5, there were shipped Saturday, 17th, 13 individuals, two Pennsylvania steels and one Pennsylvania hopper, all of which individuals we received on Friday and the steels and Pennsylvania on Saturday. We would also state Messrs. R. Pierce & Sons received at their mines, which has been idle for six months, and cannot load over 200 tons a day, on Saturday three hoppers and two steels, and on Sunday eight hoppers and two steels, making 15 cars to start work today, while we received at our No. 1 mine Saturday and Sunday nothing but two steel cars, which we loaded and shipped Saturday. We also received six Pennsylvania hoppers at No. 5 mine on Sunday and nothing at the shaft. Our No. 1 shaft mine has a capacity of 700 to 800 tons a day, and has been in operation all the time, our selling the coal during the summer at less than cost in order to provide a regular tonnage. We would like to know some reason for this preference to these people, as settlement will be asked at the proper time for all these preference matters. We are also sending a copy of this letter to Mr. Prevost.

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, *Manager.*"

Q. What do you mean when you say R. Pierce & Sons were idle six months?

A. The mine hadn't worked for that length of time.

Q. You mean wasn't in operation at all?

A. Wasn't in operation at all.

Q. And this car supply of which you complain in your letter of December 19th, 1904 was started when it started work?

A. That is what I understand from that letter.

"DECEMBER 21ST, 1904.

M. Trump, Esq., General Superintendent Transportation, P. R. R., Philadelphia:

643 DEAR SIR: We are in receipt of yours of the 19th in reference to our cars going to the P. & N. W. road and would say, the information you have on your records does not agree with that given us by the Superintendent of the Railroad, as he advises us that eight cars were sent north between the 13th and 17th, and as your information is from the 13th to 16th, evidently the delivery of cars has continued, and is not a temporary affair.

Respectfully yours,

PURITAN COAL MINING COMPANY,
GEORGE E. SCOTT, Manager."

Q. Did you ever get from the Pennsylvania Railroad any satisfactory explanation of the matters complained of in these various telegrams and letters?

A. No sir.

Q. Did you ever get any of the Berwind-White Coal Mining Company individual cars accident-ly diverted to your use?

A. Not to my recollection.

Q. Do you know how frequently it occurred that your individual cars were diverted to the use of other people?

A. No, I don't.

Q. There is frequently reference in this correspondence to individual cars, steel cars and hoppers. What is the distinction between the use of the individual cars and the other classes?

A. How is that?

Q. I say what difference is there?

A. The individual cars we tried to confine them absolutely to Pennsylvania point deliveries, and wherever you have business on other lines, like Central Railroad of New Jersey or Lehigh, we dare not send out individual cars there because we have no control after they leave the Pennsylvania Railroad and it is hard to get them back. So the steel and hoppers are system cars and are the ones we have for such trade.

Q. Was there any improvement at all in the supply of cars after these complaints were made?

A. No sir.

Q. Did you have contract and other business?

A. Yes sir.

Q. Where was your trade?

A. All through Pennsylvania and New Jersey and New York Harbor, and I had contracts for deliveries in Boston by water, and also Baker Whitely Coal Company at Baltimore.

Q. How did you sell your coal with reference to loading at the mines?

A. I sold most of it f. o. b. cars at the mines.

Q. How would you card it?

A. To the consignee.

Q. Whom did you bill as the consignor?
A. The consignor?
Q. Yes.
A. The Puritan Coal Mining Company.
Q. You say you sold a great part of it at the mines?
A. Yes sir.
Q. What do you mean by that?
A. Delivered on the cars at the mines?
Q. Is that what is commonly known as f. o. b. at mines?
A. Yes sir.
Q. Who paid the freight?
A. The party receiving the coal.

644 Q. What proportion of your shipments during the years 1902 to 1905 was sold f. o. b. cars at mines, consignee to pay the freight?
A. I should think at least 80 to 90 per cent. of it.

By Mr. LIVERIGHT:

Q. What freight rate does coal from the Martin's Branch take?
A. It takes the regular Clearfield rate, what is called the Clearfield rate.
Q. Was that the case from 1902 to 1905?
A. Yes sir.
Q. What was the rate taken by coal on the South Fork and Scalp Level Branch?
A. That took the same rate.
Q. All the time of this action?
A. Yes sir, from the first.
Q. That is to say, was the same rate taken by the Berwind coal and your coal during the entire period of the action?
A. That is the Berwind coal from the Scalp Level district.
Q. Do you say it was?
A. It was.
Q. As the crow flies what is the distance from Martin's Branch, on which the Puritan mines are located, and South Fork and Scalp Level Branch at the point where the Berwind mines are found?
A. My information is it is probably 12 miles, 8 to 12 miles.
Q. State whether or not there is any substantial difference in the conditions and circumstances between the two operations?
A. Conditions and circumstances?
Q. Whether there is any substantial difference between the conditions at Puritan mines and those at Berwind mines, physical conditions?
A. They are practically the same, except I think most of the Berwind mines are drifts.
Q. And only one of yours is a drift?
A. Only one.
Q. Is there anything in the physical condition of the mines of the Puritan Coal Mining Company and the Berwind Coal Mining Company to change the character of the service required from the Railroad Company?
A. None.

By Mr. GOWEN:

Q. In which you referred to the ability of the loading capacity of your mines?

A. I find nothing there, Mr. Gowen, in the month of April. That was the Stineman.

Q. Mr. Scott, did you furnish the information to Counsel from which the pleadings in this case were prepared?

645 By Mr. LIVERIGHT: We object to that question. That is a matter between Counsel and client and it is privileged. We object to the question as not cross-examination and it is privileged and immaterial.

By Mr. GOWEN:

Q. Mr. Scott, were you familiar with the averments which were contained in the original statement of claim filed in this case as to the tonnage which you could have shipped had you not be- discriminated against, as you claimed?

By Mr. LIVERIGHT: We object to that. The pleadings are not material so far as that is concerned, and we ask the purpose of it.

By Mr. GOWAN: I want to find out what are the facts which led to the increase in the amount of tonnage which the plaintiff claims it could have shipped had it not been discriminated against, from sixty four thousand and odd tons, which was the figure embraced in the original statement, to 298,000 tons in the amended statement.

By Mr. LIVERIGHT: We object to the question for the reason the pleadings are not in evidence, and the attention of the witness has not been directed to them in examination in chief, and it is irrelevant and immaterial what increase.

By the COURT: I think we will hear it.

A. I don't quite understand the question.

By Mr. GOWEN:

Q. In the original statement of claim which was filed in this case the averment was made that the Puritan Coal Company had during all of the time of the action constant demand and orders for its coal in excess of the supply of coal cars furnished by the defendant company for transportation and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 64,587 tons, which it would have sold to its customers therein at price aggregating f. o. b. cars above cost of producing some $49,936. That is the averment in the original statement of claim?

A. That is claimed for Pennsylvania shipments.

Q. Yes?

A. My counsel advised me the Court decision was that all coal, whether it was going to New Jersey, New York or any other place, that was billed at a price f. o. b. cars at the mines was Pennsylvania delivery.

Q. And that accounts for the increase in the tonnage between that set forth in the original statement?

A. Yes sir. By his direction it was made up in this way.

By Mr. COLE:

Q. That was a change of mind of Counsel instead of change of facts?

A. The total tonnage was not changed at all.

646 E. B. CHASE, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?

A. Ardmore.

Q. What is your business?

A. Coal business.

Q. With whom are you connected in the coal business?

A. The Berwind-White Coal Mining Company.

Q. How long have you been with them?

A. 26 years.

Q. In what capacity do you act?

A. As general manager of sales and shipping.

Q. Do you have charge of any correspondence concerning the purchase by the Berwind White Company of 1000 cars from the Pennsylvania Railroad about 1902?

A. Yes sir, I have charge of all correspondence, including that.

Q. Do you know, of your own knowledge, of a transaction of that character?

A. I do.

Q. When were those cars purchased?

A. The original negotiations I think started in June, of 1902, and were consummated in July.

Q. What character of cars were they?

A. What are known as the G. L. A. or steel coal car, 50 tons capacity.

Q. Have you charge of the correspondence that relates to that, do you say?

A. Yes sir.

Q. Will you produce it?

A. Yes sir.

Q. I show you a letter from the Third Vice President of the Pennsylvania Railroad to H. A. Berwind, dated July 17th, 1902, and a reply by Mr. Berwind, dated July 25th, 1902, and ask you if those two letters substantially cover that purchase?

A. They do.

Q. We ask to have these letters read into the record. They are the original. Will you kindly read them so the Reporter can get them?

A.—

Offices of the Pennsylvania Railroad.

Broad Street Station.

PHILADELPHIA, *July 17th*, 1902.

Mr. H. A. Berwind, Secretary of the Berwind White Coal Mining Company.

DEAR SIR: Referring to the matter of our Company's selling to yours 1000 steel hopper gondolas, known by us as G. L. cars, I find that of the series of 1000 cars which we can sell to you there have only been completed and available for delivery 727. The remaining 273 to make the 1000 will have to be supplied out of a new order for 1000 cars to cover the 1000 sold to your company, given to the Pressed Steel Car Company, upon which they promised to deliver at the rate of 35 cars per day commencing November. As the cost of the cars to us is based upon the cost of material, percentage of profit, etc. therefore their exact cost cannot be determined, but we believe that it will not amount to more than $1200.00 a car, and I write to ask whether you are willing to accept and pay for the cars as they are delivered to you at this rate. When all the 1000 cars have been delivered to our Company an equitable adjustment can be made so that not more than the entire cost to our Company for the cars will be charged to you. Awaiting your acceptance of this proposition, I am,

Yours truly,

S. M. PREVOST,
Third Vice President.

The second letter is dated, Philadelphia, July 25, 1902. Addressed to S. M. Prevost, Esq., Third Vice President Pennsyl-
647 vania Railroad Company, Philadelphia.

DEAR SIR: We are in receipt of your valued favor under date of July 17th, from which we understand that at this time you are only in position to deliver 727 of the 1000 one hundred thousand pounds steel hopper G. L. Cars sold to us and that the remaining 273 cars will have to be supplied out of a new order for 1000 cars, which latter order the Pressed Steel Car Company promise to fill at the rate of 35 cars per day commencing November 1st. We also understand you have fixed the price at $1200.00 per car and that an equitable adjustment will be made when the actual cost of the cars have been determined. This is entirely satisfactory to us and is hereby accepted.

Yours truly,

H. A. BERWIND, *Secretary.*

Q. Were those cars delivered substantially in accordance with that requirement?

A. No sir. The 727 cars referred to while on the line of the Pennsylvania Railroad, were distributed all over the system, so

that the cars were not delivered to us for quite an interval from the time purchased or time of the arrangement.

Q. Were they delivered as soon as they were free from the service they were then in, if they were loaded and so on?

A. We have no means to tell, only we know these cars had been marked with the name of the Pennsylvania Railroad on them, and as they were delivered at their shops where that marking was to be taken off and our marking put on, as the cars were marked they were turned over to us, and I have a statement here showing how many of the cars were received from time to time.

Q. Just give us that please?

A. In August 1902, 55 cars. September 398 cars. October 391 cars. November 59 cars. December 39. January 1903, 9 cars. March 8, April 14, June 14, August 10, December 3. Making a total of 1000 cars.

JOHN SCOTT, JR., called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. Where do you live?

A. Philadelphia.

Q. Are you a professional man?

A. I have been a practicing lawyer there for over 30 years.

Q. How are you related to George Scott, of the Puritan Coal Mining Company?

A. I am his brother.

Q. Did you ever have any interview, together with him, with any officer of the Pennsylvania Railroad Company relative to car supply of the Puritan Coal Mining Company?

A. Yes sir. I had an interview, which I arranged and to which I asked my brother George to accompany me, with Mr. Trump.

Q. At whose instance was that interview had?

A. The interview was had and was in response to a letter I received from Mr. Prevost, Third Vice President of the Company, asking me to take up with Mr. Trump the question of car supply as to which I had written Mr. Prevost very fully, complaining as Attorney for the Puritan Coal Mining Company of the car supply to the mines at Puritan.

Q. How long after you received word from Mr. Prevost to visit Mr. Trump was it before you went to see him?

648 A. Within the next week or two, I don't recall the exact date.

Q. Where did you call on him?

A. At his office in Broad Street station.

Q. Were there any one with you except your brother George?

A. No sir. I can fix the date very closely by the letters, if I look at them. (Examines letters). Mr. Prevost's letter to me was dated March 7th, 1903, and asked that I call upon Mr. Trump and talk to him in regard to all the matters as to which I had written Mr. Prevost.

es the defendant have the original of Mr. Scott's letter to Prevost?

Mr. GOWEN: I have it.

By Mr. LIVERIGHT:

Have you a copy?

I have a letter press copy of the letter.

Give the details of the interview that you and your brother with Mr. Trump at his office in Broad Street Station?

Well in order to explain that I had probably better refer to Prevost's letter to me, which reads as follows: Referring to your of March 3rd. Since its receipt I have made inquiries of Trump, and learn that you have been receiving since January n the neighborhood of 40 per cent more cars than an equitable ion of cars available for distribution would really have given The reason for this can be explained by Mr. Trump and in- I would be glad if you would call upon him and talk to him gard to all the matters of which you have written me. Yours , S. M. Prevost, Third Vice President. I asked my brother ge to go with me. I was acting as Attorney for the Puritan pany, in which capacity I had written Mr. Prevost, and of e I wished him as the general manager of the Puritan Com- to go there. We went to Mr. Trump's office and was shown his room in the Broad Street Station, and he informed us very y that it didn't make any difference what we or anybody else t think about the distribution of coal cars on the mountain, the Pennsylvania Railroad had made up its mind to take care erwind and run all chances of doing it. I expressed my sur- that a general officer of the Pennsylvania Railroad should any such statement, and he said that didn't make any differ- that that was their position and he wanted us to know it. That followed by a general discussion of what was meant by cars able for distribution and the question of special assignments were talked about at the time, especially the special assign- of 500 cars a day which has been mentioned here.

Did you directly call Mr. Trump's attention to the 500 cars assignment to Berwinds?

That was talked of there, but we were informed that was none r concern.

By Mr. Trump?

By Mr. Trump.

Did he either admit or deny such a thing existed?

Well I can't say that he flat-footedly admitted it. My recol- n is he did, but it was evidently regarded as none of our busi- any way.

What did he explain as being the meaning of the word "avail- in the expression "available for distribution"?

Well the conversation in that was general, but their construc- of the word "available" as he gave it to us was that it was cars that were left after special assignments were taken care of.

Q. How long were you in the office?

A. I should say were *were* there half an hour

Q. Did you directly charge Mr. Trump that they were devoting to the Berwind White Coal Mining Company equal to 500 cars daily before anybody else got cars?

A. That was also discussed. I believe I made that statement, that was my belief at the time from very positive information I had. My information was from people who told me they had seen the original orders.

Q. What was his response to that charge?

A. Well there was no denial of it.

Q. Was it in answer to that allegation that he told you it was none of your concern?

A. Yes, I would take it that it was. Of course, I am talking after a lapse of all these years. The distinct impression that was made on my mind was the absolutely positive statement he made that we and all others might just as well know that the Pennsylvania Railroad had made up its mind to take care of Berwind and run all the chances. I asked him if he knew what the chances were and what risk they were running. He said, yes, he knew it and they were going to take it.

Cross-examination.

By Mr. GOWEN:

Q. You say this interview was the result of a letter which you had written to Mr. Prevost, the Third Vice President of the Pennsylvania Railroad Company, dated March 3rd?

A. Yes sir.

Q. Prior to that you say you had learned through some one that special orders in favor of Berwind White, covering the delivery of the equivalent of 500 cars, were outstanding?

A. I had heard so, yes sir.

Q. Did you make any reference in your letter to Mr. Prevost of that condition?

A. Generally, yes sir.

Q. Refer to your letter?

A. You have my letter there. Shall I read from this?

Q. Yes.

A.—

S. M. Prevost, Esq., Third Vice President, Broad Street Station, Philadelphia.

DEAR SIR: As Attorney for the Puritan Coal Mining Company and the Stineman Coal Mining Company, I am instructed by my clients to call attention to the inequality in the allotment of cars to the operations of these Companies, and to make formal demand for such a car supply as we are entitled to receive from your Company in the ordinary and equitable exercise of its function as a common carrier. The Puritan Coal Mining Company from its works at Puritan shipped from its mines in 1902, in round figures, 210,000 gross tons, a monthly average of 17,500 gross tons. In January 1902 we shipped 17,600 tons, and in January 1903 we have been able to ship only 11,850 tons. Our capacity at these mines

om 1,200 to 1,400 tons per day, and the restriction upon our ut in 1902 was then due to inadequate car supply. The Stine- Coal Company, with its operations at South Fork, has a daily city of about 1,200 tons. During the year 1902 it mined and ped from South Fork 212,000 tons. During the month of ary 1902, 18,800 tons. During January 1903 we were able ip from this mine only 12,280 tons. The restriction upon the put was from the same cause, lack of cars. At the Puritan Coal ing Company up to and including February 24th, 1903, we re- d only 128 Pennsylvania cars, 36 foreign cars, and during this th had the use only of 98 of our own 150 individual cars. These individual cars were taken by your road for general service during the car shortage of the early winter and have not yet been returned to our service. We are in receipt of repair on these cars from points to which we have never made ship- ts and the cars are evidently kept in the service but are not re- ed to our use. The Stineman Coal Mining Company up to and uding February 27th received at its works during the month of ruary only 134 cars. It is easily capable of calculation that on basis the shipments of either Company cannot be much more half of our shipments of last year. We cannot object of course deficient car supply, which is common at the time for any gen- cause, either to the region or generally in the trade. We do pro- and object most seriously, however, to a method of distribution ch gives us a reduced car supply, and restricts our output, at a e when the general shipments of bituminous coal over your road, n this region, are larger than ever, and when miners and ship- in our own regions, under similar conditions, and with the e or less capacity, are actually receiving day by day under so- ed special assignment a car supply largely in excess of that re- ed by us. We are informed freely at Altoona, by your ials there, that they are obliged out of general car supply to a certain number of special assignments, giving fixed numbers ars daily to special operators, and that our own allotment must e out of what is left after these have been filled. It is easily able of proof that these assignments are made, and that they are d, and investigation on your part will disclose the fact that some- in authority is adopting this method of distribution rather than equitable method which would properly apportion among the rators of the region such cars as are available without distinction liscrimination in favor of any one as against any other one under e conditions. We desire, however, to call to your attention the ts as to our own allotment and ask that we receive at your hands consideration to which we are fairly and legally entitled.

Respectfully yours,

JOHN SCOTT, JR., *Attorney.*

Q. You were treating the assignments under Berwind White npany generally with all the assignments of which you were com- ining?

A. Yes sir.

Q. No special reference.

A. In the letter itself there is no special reference.

Q. You know there were a whole lot of special assignments from time to time in favor of the Puritan Company?

A. No sir. I do know it was very broadly intimated to us that day by Mr. Trump, if we asked for special assignments we might possibly get them.

Q. You did not ask for it?

A. We did not ask for that.

By Mr. COLE: The following telegrams, having been produced by the defendant on notice from the Plaintiff, they are now offered in evidence.

"R. L. O'Donnel:

We are having so much complaint about our failure to get a supply of cars to Scalp in time for today's loading, and in order to prevent a recurrence during the coming week, I will be glad if you will keep in the Scalp Level region and around South Fork, in addition to the daily supply of cars about 100 or 150 cars extra, so that in the event of any delay happening to the traffic on the Middle Division, or between Altoona and the mines, we will have a margin to draw on, and give the operators a start in the morning until such time as the regular supply reaches them. I hardly know what effect this is going to have on our distribution, but it is exceedingly important that we keep Scalp supplied and I will be glad if you will so arrange. What we would like to do is to give Scalp
651 equal to 500 cars on Monday and Tuesday, about 450 during the balance of the week, steel cars counting as two. Will you please acknowledge receipt.

6-28-1902.

J. M. WALLIS."

"R. L. O'Donnel:

We have been rather unfortunate in getting a supply of cars at Scalp this week, up to the necessities. I would be glad if you will arrange so as to insure equal to 500 cars on Monday and Tuesday and 450 cars per day, during the balance of next week, and in order to do this, I would be glad if you will arrange to accumulate and hold over each night if possible 100 or 125 steel cars so there will be no difficulty in having the cars at the mines in time for loading the following morning.

7-19-1902.

J. M. WALLIS."

"R. L. O'Donnel:

We are putting too many cars into Scalp. What we would like is equal to 500 cars on Monday and Tuesday and equal to 425 during the balance of the week. Won't you please so arrange, taking advantage of any additional cars to help some of the other mines out.

8-8-1902.

J. M. WALLIS."

"R. L. O'Donnel:

Commencing at once, please make the order for Scalp equal to 500 Monday, Tuesday, equal to 425 other days. Lime.
9-26-1902.

J. M. WALLIS."

"J. M. Wallis:

Please see my message of September 4th in regard to distribution of coal cars to the Scalp Level mines. As this arrangement was not carried out by reason of the poor run of empties west and other causes, it should be continued indefinitely until further notice. I understand they were short 100 cars today. With the increased number of cars now in the coal trade I hope you will be able to continue the arrangement.
10-2-1902.

M. TRUMP."

Message of September 4th, referred to above cannot be located. Probably a phone message.

'R. L. O'Donnel:

Commencing tomorrow and until further notice please place at Scalp equal to 500 cars daily.
10-3-1902.

J. M. WALLIS."

'R. L. O'Donnel:

Commencing at once, please arrange to see that the mines of the Berwind-White Coal Mining Company at Scalp receive equal to 500 cars daily; counting steel cars as two, before placing at any other operation in the Scalp Level region or on the mountain.
10-16-1902.

J. M. WALLIS."

'R. L. O'Donnel:

In addition to having 500 cars at Scalp, in order to protect it, I would be glad if you will make a special effort to have 150 to 200 cars standing over there each night, even if you do not place cars on the mountain for coal. The mines of the Berwind-White 352 Coal Mining Company must be supplied with equal to 500 cars each day, in order that there will be no difficulty, as result of accident or the cars being late. We are not prepared to take any chances on getting the cars to Scalp and in addition to having 500 at their mines in time for loading daily, in order to protect ourselves, we should have an extra 150 or 200 standing over each evening, to start them in the morning. Please so arrange.
10-21-1902.

J. M. WALLIS."

"R. L. O'Donnel:

We are not meeting with the success necessary to get 500 cars to Scalp daily. Will you please refer to my telegram last week requesting that equal to 500 cars daily be placed at the mines of the Berwind White Coal Mining Company at Scalp, in addition to the cars placed at Yellow Run mine, in preference to pla-ing cars at any other operation on the mountain or in the South Fork district, and see that the instructions are carried out. Special efforts should be made to get the cars to the mines in ample time for loading each day. The Berwind White Coal Mining Company have not been able to coal the mail steamers in New York Harbor last week and this week. Most positive instructions should be issued and the arrangements carried out, with equal to 500 cars will be at the mines of the Berwind White Coal Mining Company, Scalp Level region, each and every day, before any attempt is made to supply cars to the operations on the mountain, South Fork district or South Fork Railroad. Please advise if understood.

10-21-1902.

J. M. WALLIS."

"R. Pitcairn, Pittsburg:

Please give Berwind's mines at Scalp all the cars you have in the territory for tomorrow, cutting the other operations.

11-22-1902.

J. M. WALLIS."

"R. L. O'Donnel:

We positively must get equal to 500 cars at Berwind White mines at Scalp tomorrow. Won't you please arrange to force every suitable car you can get out of Altoona to Scalp and get them there in time for tomorrow's loading, without fail. Please answer.

12-11-1902.

J. M. WALLIS."

"S. C. L., P'gh:

It is exceedingly important to place equal to 500 cars daily at Scalp each day next week, failure upon our part to do this will result in serious dal-ys to the coaling of steamers of the Berwind Coal Mining Company contracts to guarantee no failure in getting cars there daily we desire to keep an accumulation of equal to 175 or 200 cars over in the region daily above their loading capacity during the week. I shall be glad if you will see that this is done and have the cars moved promptly from Altoona and the loads returned promptly here. You are no doubt aware that several trains of steel cars for Derry and Scalp were allowed to stick here last P. M. from 4 or 5 o'clock until 2 or 3 this A. M. due to your failure to take them from the yard. Ack. receipt.

1-10-1903.

G. W. CREIGHTON."

S. C. L., O. D.:

Our efforts this week in keeping Scalp supplied with cars have not been at all successful. Please renew the instructions to all parties

interested that before placing cars for other operations on the mountain or on the South Fork Railroad equal to 500 cars must be placed for the Berwind White Coal Mining Company h and every day, until further notice and it is important that icient cars should be placed early each morning so that all of mines will have a supply to start with and there will be no ger of any of the operations being idle, on account of not hav- cars. To protect ourselves on this arrangement, I would be glad ou will arrange to accumulate and have standing over daily equal 75 or 225 cars, in addition to the 500 that are required for load- This is absolutely necessary, in order that the requirements of Berwind White Coal Mining Company can be met and the nes of the management in the East carried out. The only ex- ion that should be made to the order is for the Dunlo drift mine ave sufficient cars daily to protect the N. Y. P. & N. supply coal er which I think is 200 tons per day. Acknowledge receipt. -14-1903.

G. W. CREIGHTON."

. L., O. D.:

ommencing at once, if we place equal to 500 cars at Scalp for ing and have the cars there in time for the mines to start in the ning, it will be satisfactory. This for the present will cancel the ial instructions issued some time ago, directing that from 250 00 cars be kept standing over each night. Our reports this morn- indicate that we have equal to 1028 cars in sight for today's ing, which will give us at least 550 in sight for tomorrow. refore, any cars you get from Altoona today other than the Ber- d White Coal Mining Company steel cars, should be distributed he best advantage, on the mountain and South Fork Railroad. e.
20-03.

G. W. CREIGHTON."

PHILA., 7-21-03.

W. C.:

lease do not disturb the instructions in regard to keeping the p Level territory fully supplied with coal cars. We have had with Berwind White Coal Mining Company in regard to the en route for Harsimus and they have arranged to cut down the ments. Silver.

R. M. P. 3.45 P. M.

C. Long, P'gh:

you place equal to 175 cars at Scalp during the balance of this daily, it will be satisfactory. Any more than this number you should be placed to the best advantage on the South Fork R. R. mountain, giving the largest operations, such as Webster, Stine- and South Fork and other operations of this class preference. nowledge receipt.

G. W. CREIGHTON. July 29-03."

S. C. L., O. D.:

Commencing with the distribution on Monday, August 3, please arrange to protect the Scalp Level operation to the extent of equal to 500 cars daily.

G. W. CREIGHTON. 8-1-03.

"S. C. Long, Pittsburg:

It is not desired to give Scalp, including Yellow Run, 375 or 400 cars daily, until further notice.

G. W. CREIGHTON. 12-22-03."

654 "S. C. Long, Pittsburg:

Please place equal to 250 cars at Scalp, including Yellow Run, tomorrow, the same number on Thursday. We will advise you later as to the number of cars to place on Saturday.

G. W. CREIGHTON. 12-22-03."

"G. W. Creighton:

We are falling behind on our steamship contracts in New York, and the Berwind White people have got to unload Sunday. Under these circumstances please arrange to give them a full supply of cars tomorrow and Saturday. This is to be understood as a special order. Lime.

12-8-1904.

R. M. PATTERSON."

"G. W. Creighton:

Please see that Scalp Level gets a full supply of empty coal cars tomorrow and after taking care of the Company coal orders, please arrange to give Scalp a full supply of empty coal cars every day this week thereafter. You may consider this a special order.

12-12-1904.

R. M. PATTERSON."

* * * * * * *

R. L. O'DONNEL, called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What is your position with the Pennsylvania Railroad Company?

A. General Superintendent of the Western Pennsylvania Division.

Q. Located at Pittsburg?

A. Located at Pittsburg.

Q. What was your position in 1902?

A. Superintendent of the Pittsburg Division, located at Pittsburg.

Q. Now you are General Superintendent?

A. Yes sir.

Q. Did you hear Mr. Cole reading copies of the telegrams into the record just now?

A. I did.

Q. Do you remember receiving the telegrams that he read?

A. I do not, in specific cases.

Q. Do you remember in a general way having received telegrams of the tenor of those read into the record?

A. In a general way, yes sir.

Q. By looking at them would you be able to recall whether or not you did receive the originals of which these are copies?

A. I couldn't recall by looking at them, but I have every reason to believe that I did receive them.

Q. In response to these instructions from headquarters to see that Berwind White at Scalp Level received equal to 500 cars daily and to the instructions contained in the telegrams to see there were anywhere from 100 to 200 cars standing over in addition so to be ready to load in the morning. What did you do?

A. I probably done very little myself, personally. Those
655 messages would come to the office and be taken care of by the train master and the trainmaster would delegate them to the territory to which they belong in which the operation would be carried out.

Q. Would you see them?

A. I would probably see them, if they were of importance enough to be brought to my attention.

Q. Who was the train master you referred them to?

A. Mr. Edward Pitcairn would be the man who would have a great deal to do with that at that time.

Q. What instructions did you give Pitcairn with reference to handling them?

A. He had instructions to carry out any general routine business that came to us from the General Superintendent.

Q. Was it your duty to see these orders you received from Broad Street or Altoona were carried out?

A. Yes sir.

Q. Did you perform that duty?

A. To the best of my ability. Those messages indicate I didn't in some instances.

Q. Those were rare instances?

A. I wouldn't say they were. We had a pretty hard time in 1902.

Q. In the majority of instances you carried them out to the best of your ability?

A. I tried to.

Q. What was there to prevent your carrying out these instructions?

A. Well the flow of cars might be not very good. Then we would have trouble with the power and we would have trouble getting our trains into Altoona, which necessitated the delay in getting the engines returned from Altoona, and my memory is that that year of 1902 was a very strenuous year.

Q. Well these telegrams cover all the way down to 1904?

A. Well I left there in 1903.

Q. What time?

A. I left there January 1st.

Q. Where did you go?
A. Went to Buffalo as General Superintendent.
Q. And how long did you stay away from Pittsburg?
A. From January 1st, 1903, to March 1st, 1911.
Q. You were succeeded by Mr. Long?
A. Yes sir.
Q. He is the S. C. Long referred to in these telegrams?
A. Yes sir.
Q. Now as far as the circumstances would permit state whether or not you saw that Scalp Level and particularly Berwind White got these preferential distributions?
A. Well I would say this, Mr. Liveright, that my memory wouldn't be good as to what happened on any particular day.
Q. Generally?
A. And the distribution sheets would more clearly show what was done than these orders would show. I couldn't say positively, but the distribution sheets, if you refer to them, should give it by dates.
Q. Where these telegrams directed you to see that Scalp Level got so many cars regardless of whether anybody else got any or not, did you carry those orders out?
A. I endeavored to, but whether I did or not I can't say positively.
Q. To the best of your ability?
A. On the Pennsylvania Railroad the subordinates carry out the orders of superiors as far as possible to do it.
Q. Do you know as a fact as a consequence of carrying out these orders it often happened no other operator than Berwind got any distribution of cars on a particular day?
A. I do not. I would refer you to the distribution sheets.
656 Q. Do you know that as a consequence of carrying out these orders there was a great complaint by the other operators in the region?
A. I don't know that that complaint arose from these orders, but I know there was a great complaint over the entire division. That complaint you know existed in the Pittsburg territory proper, as well as in the mountain territory.
Q. I didn't catch that?
A. In the Pittsburg territory proper as well as in the mountain region.
Q. To whom in the mountain region was it delegated to carry out these instructions after they passed through you and Mr. Pitcairn?
A. I say from April, 1902, until November, 1902, Mr. David Steele, Assistant Train Master. From November, 1902, until January 1st, 1903, as far as I know Mr. E. W. Zimmerman had charge beyond South Fork on the South Fork Branch, whilst Mr. Steel still took care of the mountain.
Q. That is prior to this date in 1902 Mr. Steele had charge of both the mountain and South Fork?
A. Yes sir.
Q. In the fall of 1902 the duties were divided?
A. Yes sir.

Q. How long did Mr. Zimmerman stay at South Fork in that capacity?

A. His office was at Conemaugh and he was there all the time so long as I remained on the Division.

Q. Do you know whether he remained under Mr. Long?

A. I think he did.

Q. How long did Mr. Steele stay in control at Altoona?

A. He is still there.

Q. What is his official title?

A. Assistant Train Master.

Q. Who is his immediate superior?

A. Would be Train Master Pitcairn at that time, Edward Pitcairn that is.

Q. Who was his next subordinate?

A. I couldn't tell you that.

Q. Do you know who was Mr. Zimmerman's subordinate?

A. No, I couldn't tell you that.

Q. What position did Mr. Boyer hold at Altoona?

A. Mr. who?

Q. Boyer?

A. He was chief clerk to the General Superintendent of Motive Power.

Q. What position did George W. Clark hold?

A. Well he was car clerk to the General Superintendent you might say of the Pennsylvania Division.

Q. Was he in the office of Mr. Creighton or Mr. Steele?

A. He was in the office of Mr. Wallis.

Q. Mr. Wallis was succeeded by Mr. Creighton?

A. That is right.

Q. Did Mr. Clark continue there?

A. Yes sir.

Q. Do you know whether or not consequent upon these instructions the Berwind White Coal Mining Company did get as many as equal to 500 cars daily coal car supply of 1902, 1903 and 1904?

A. I can't say that. I would refer you to the sheets.

By Mr. O'LAUGHLIN: We object to this character of testimony. These men have had these sheets and compiled statements from them that show.

3657 By Mr. LIVERIGHT:

Q. If there was a flow of cars on the Pennsylvania system between Philadelphia and Pittsburg that would give Berwind equal to 500 cars daily coal for supply, did Berwind White Coal Mining Company get those cars?

A. My answer to that would be this, that we got a good many kicks for not complying with or giving them all the cars we were required to give them, and whether they did or not I couldn't remember positively, but I remember some kicks.

Q. You remember some kicks at times when probably they got 498 or 499?

A. No they wouldn't bother about that.
Q. Wouldn't bother about such a trifle?
A. I wouldn't think so. You see, Mr. Liveright, the length of time is very great here and I can't do anything but put you back to the distribution sheets.
Q. Did you ever have any conversation with your superior officers on the same subject referred to in these telegrams?
A. I don't remember any, if we did. It is quite likely we telephoned back and forth on it, but I don't remember.
Q. What was the nature of those conversations, to carry out the orders or what?
A. I presume so, but I don't know.
Q. I direct your attention to telegram 10-16-1902, R. L. O'Donnel, commencing at once please arrange to see that the mines of the Berwind White Coal Mining Company at Scalp receive equal to 500 cars daily, counting steel cars as two, before placing cars at any other operation in the Scalp Level region or on the mountain. J. M. Wallis. Now if there were 500 cars in the region, state whether or not you saw to it that they were distributed to Berwind Coal Mining Company before any cars were given to anybody else?

By Mr. O'LAUGHLIN: We object to that. What was distributed in the region has been in their possession for a considerable length of time, which is an absolute physical fact and this man's memory has nothing to do with it, he can't testify to what it was and they know he doesn't know.
By Mr. LIVERIGHT: It might be he could recall this particular transaction.

A. I don't.

By Mr. O'LAUGHLIN:

No cross-examination.

GEORGE W. CLARK called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you reside now?
A. Altoona.
Q. Where were you living in 1902 and 1903?
A. Altoona.
Q. And 1904 down to the 1st of January 1905?
A. Altoona.
658 Q. What position did you hold there with the Pennsylvania Railroad?
A. Car clerk in the General Superintendent's office.
Q. What were your duties?
A. Distribution of cars to the regions and following up the freight train movement.
Q. These telegrams, you have heard them read, have you, that have been offered in evidence?

. Yes sir, some of them.
. Would they come to you in the ordinary course of your busi-
there?
. Those addressed to the General Superintendent of Altoona
ld come through our office, yes sir.
. Would you get your instructions from these telegrams and was
our duty to see they were carried out?
. Why it was our duty to place the instructions, yes sir.
. Who made the allotment after you got these orders, whose
was it to do it,—yours?
. It would come under the car clerk's office of the General Super-
ndent.
. Did that devolve on you?
. Yes sir.
. What did you do in reference to carrying out these orders?
. Well we as far as possible tried to carry them out.
. How.
. As far as possible we tried to carry them out.
. If the cars were there, you carried them out, did you?
. If the cars were there, we made the distribution accordingly,
ir.
Made distribution according to the instructions received here?
. No, not at all times. We varied from these instructions at
s.
What would justify you in varying from the instructions con-
ed in these orders, if the cars were there?
The condition of the railroad in regard to the movement of
traffic. If the yards were blocked. Shortage of power. We
d divert trains of cars to get them into places where we could
lle them to better advantage.
It was only because of extraordinary circumstances that pre-
ed you from carrying these out. You wouldn't change the
rs, if they could be carried out, would you?
It wouldn't be my duty to carry out the orders.
To see they were carried out.
We would place the instructions at the necessary point and
ct the Division Superintendent or his representatives to carry
out, if it was possible.
Do you have any recollection of what was done there about
special orders, special assignments of cars?
Done where?
Through your office. Do you have a recollection as to whether
were carried out or not?
Why to the best of our abilities, the condition of the road per-
ng, we tried to carry out the instructions.
Have you a personal recollection of some of these transactions?
No, I wouldn't say I have. I have been away from the Rail-
five or six years and couldn't answer that.
Do you state whether or not you remember that during the
that is covered by these orders here that there were days when

Berwind White, by virtue of these orders, got substantially all the cars that was there for distribution?

A. I couldn't answer that. The railroad records will show that. I haven't got those records, I couldn't say positively.

Q. Were these orders here what you would call special as-
659 signments of cars that had to be carried out before any general allotment was made?

A. They were what we considered special orders.

Q. And would it be your duty to fill these special orders before any general assignment of cars were made at all?

A. Not in all cases, no sir.

Q. Now what would prevent or deter you from carrying out an order of this kind, for instance. Please give Berwind's mines at Scalp all the cars you have in that territory for tomorrow, cutting the other operations. Now would you carry out that order to the exclusion of everybody else, by giving the cars to Berwinds?

A. If the conditions permitted, we would carry out the order.

Q. Yes, if the conditions permitted?

A. Those were our instructions.

Q. Well how was it the conditions sometimes permitted of your giving them these 500 cars?

A. I couldn't answer that.

Q. You would have to refer to the sheets?

A. I would have to refer to the records.

Q. Did you divert all the cars that was in the region to filling these orders before any general distribution was made?

A. On any particular date?

Q. At all times was that your system?

A. No sir.

Q. What varied it?

A. As I told you accidents on the road, the shortage of cars, yard conditions and like that. We couldn't move all the cars we had to one point, because we were liable to have an accident and interfere with it.

Q. I mean barring accidents, Mr. Clark, did you devote all the cars that were there first to the carrying out of these special orders?

A. No sir.

Q. Before you made any general distribution?

A. No sir.

Q. What were the exceptions?

A. We would place cars for company coal first.

Q. For Company coal?

A. Yes sir.

Q. Before these cars were placed?

A. Yes sir.

Q. That is the tenor of these orders, isn't it, you are first to place the Company coal cars and then all cars in the region to go there?

A. All cars to go to Berwind?

Q. Up to this 500 cars?

A. If we have those instructions out, that is the way we would carry them out.

Q. Carry them out just as they were given?
A. Yes sir.
Q. Now what do you say, what trade or business had the first laim on the cars that came into your territory for districts?
A. That depended on the class of cars. If it was a box car or coke ar or cattle car they went to different regions.
Q. Coal cars?
A. We first took care of the company coal supply.
Q. The Pennsylvania Railroad Company fuel supply first?
A. Yes sir.
Q. Then what would come next?
A. Then we would try to make distribution to the various regions fter the special orders were protected.
Q. Next would be special orders after fuel supply?
A. If the cars were available. Very often they were not available ven for company coal.
Q. If they were there?
A. Yes sir.
60 Q. Then you would first supply the special assignment?
A. Yes sir.
Q. Then what would be the next claim on cars for distribution?
A. They would go into general distribution.
Q. State in making special assignments did you frequently consume all the cars that were on the system for distribution, so that you had none for general distribution?
A. Not as a general thing, no sir.
Q. Not as a general thing, of course, but did it happen?
A. It happened some days we didn't have sufficient cars for Company coal.
Q. Have you a recollection now and do you know by what you did over there that there were days when the Company fuel coal and special assignments consumed all of the cars you had for distribution?
A. I couldn't say that without the record.
Q. You don't remember that?
A. No sir.
Q. Wasn't that a pretty strenuous time, wasn't the circumstances pretty strongly impressed on your mind during 1902 and 1903?
A. Yes sir, it was a very strenuous time along the railroad for everybody.
Q. Don't you remember there was days that the operators outside of the special assignments got nothing at all?
A. I have no doubt there were days like that, yes sir.

* * * * * * *

Q. The Company had a system of distributing cars regulated by rules?
A. Yes sir.
Q. Did the special orders take precedence of those rules?
A. When we had the cars the special orders took precedence, yes sir.

* * * * * * *

M. TRUMP called on part of plaintiff, being duly sworn and examined, testified as follows:

By Mr. LIVERIGHT:

Q. What was your official position with the Pennsylvania Railroad Company in 1902, 1903 and 1904?
A. General Superintendent of Transportation.
Q. Where located?
A. Philadelphia.
Q. Did you have charge of the car distribution?
A. In a general way, yes.
Q. Did the rules and orders relating to that subject emanate from your office?
A. Yes.
Q. And transmitted through your subordinate to the person who actually directed the distribution?
A. Yes sir.
Q. How was the distribution of bituminous coal cars in the Central Pennsylvania and Western Pennsylvania field regulated?
A. Regulated by the General Superintendent at Altoona.
Q. I mean was it regulated according to the given capacity of a mine?
661 A. Regulated approximately on the region capacity and the orders received for cars for the next day.
Q. That is to say, all the regions were taken together and then it was ascertained how many cars were desired in a particular region and the car supply distributed according to the requirements of each division. Is that it?
A. Well I am only speaking not from my own knowledge but in a general way. Each mine had a rating and each region had a rating. As these cars passed west the General Superintendent at Altoona, based on the knowledge he had of the requisition for cars and the general proportions for distribution, would send those cars to the different regions.

* * * * * * *

Q. Now in dividing the cars that *that* were on a particular division, say in 1902 during the strike, what was counted against the capacity of that mine. I don't mean capacity. What was counted against the distributive share of that mine?
A. I don't quite catch you there. The cars were, of course.
Q. What cars were?
A. The rule of the Company in 1902 was that the individual cars and Company fuel cars did not count in the distribution, but the car distributor used his judgment to a large extent and the individual cars were in many cases counted in the distribution.
Q. Well then if Puritan mine was rated at five per cent of the cars on the Mountain Division and there were 29 individual cars and 500 other cars wouldn't the five per cent come out of the other cars?
A. You mean 20 individual cars to the Puritan?
Q. Wouldn't it get its 20 individual cars flat and five per cent out of the other cars for distribution?

A. That was the theoretical method of distribution, but I say e car distributor hadn't any hard and fast rules at that time. The r distribution used his own judgment to a large extent.
Q. And if he wanted to charge individual cars against distributive are he did so, and if he didn't want to charge it, he let them go thout any charge?
A. I can't answer what he did?
Q. What do you mean by saying he used his judgment?
A. I say this. When there was a run of individual cars to a ine, very frequently he didn't give them any P. R. R., if somedy else wanted them. The records show that.
Q. But all this time individual cars were supposed not to be arged against distribution.
A. That was our method.
Q. And if he saw an operator getting his own cars, he used his dgment; if he didn't feel like it, he didn't give the operar many of the system cars?
A. I am only talking from what the records show. I don't know iat he felt or anything about that.
Q. Wasn't that the way it worked out practically?
A. That is the way it worked out practically to a general extent.
Q. But theoretically that wasn't the rule at all, was it?
A. No sir.
Q. The operator under the theoretical rule of the Company was pposed to get his individual cars and his pro rata of the general ow of cars, excluding individuals, wasn't he?
A. I don't know that we had any rules in 1902.
Q. Wasn't that as near a rule as you had?
A. Yes, it was generally understood that individual cars belonged the owner and were at his disposal.
Q. And he wasn't chargeable with them against his distribution?
A. Yes, that was general.
Q. Wasn't that the rule that was supplied to Berwind
32 White Coal Mining Company?
A. Yes sir.
Q. And also to Puritan Coal Mining Company?
A. Yes sir.
Q. And to many other owners of individual cars?
A. I say that was the general rule. What happened I can't tell. ou will have to get that from the sheets.
Q. What is popularly known as the Mountain Division of your ilroad?
A. Altoona to Conemaugh.
Q. That is the eastern end of the Pittsburg Division?
A. Yes sir.
Q. Technically and on your records it is called the Pittsburg ivision?
A. Yes sir, or East End.
Q. That is the main line and all its branches between those two oints, that is between Altoona and Conemaugh?
A. Yes sir.
Q. Does that include Martin's Branch?

A. Yes sir.
Q. Does it include Scalp Level and South Fork Branch?
A. No sir. That was a separate region.
Q. The Mountain Division was confined to the main line from Altoona to Conemaugh and its branches, excluding Cambria & Clearfield, Pennsylvania & Northwestern, and Scalp Level and South Fork?
A. Well Pennsylvania & Northwestern is on Middle Division. The main line and branches, exclusive of the South Fork district, which was a separate district.
Q. Exclusive also of the Cambria & Clearfield, wasn't it?
A. That is not a branch of the Pittsburg Division. It is a separate Division.
Q. The same as the South Fork and Scalp Level?
A. Yes sir.
Q. In these telegrams that were read yesterday the Mountain Division is referred to a number of times. What is meant thereby in the telegrams you sent?
A. Altoona to Conemaugh I suppose.
Q. Excluding Scalp Level and South Fork?
A. Yes sir. Will you read the telegram you are referring to?
Q. I don't find any over your signature, in which the word Mountain Division is used, but I do find a number from your associates or subordinates, I don't really know which they, how you rank as officers in which the word Scalp Level region or the mountain is used?
A. Mountain means the division from Altoona to Conemaugh of which you have the sheet.
Q. And includes all the mines on that Division?
A. Yes sir.
Q. Was there any change made in the method of distribution in 1903?
A. I think not.
Q. It continued on the same haphazard way that it was before?
A. How is that?
Q. It continued on the same haphazard way that it existed in 1902?
A. We changed our method I said in 1906.
Q. 1906?
A. Yes sir.

* * * * * * *

663 DAVID STEELE called on part of Plaintiff, being duly sworn and examined, testified as follows:

By Mr. COLE:

Q. Where do you live?
A. Altoona.
Q. What was your business in 1902, 1903 and 1904?
A. Assistant Train Master for the East End of Pittsburg Division.
Q. Would the requisitions for cars that was made by the Puritan mines come into your hands?

A. It was made in my office by my clerks. I have them here.
Q. About how frequently were requisitions made by them; were they made daily or otherwise for cars?
A. Daily.
Q. Daily?
A. There may be an occasional time that some man would miss it and sometimes he would call up by telephone and notify us he hadn't sent it, but as a general thing he got them pretty correct.
Q. Can you tell off hand about the extent of that requisition, was it up to their capacity?
A. Yes sir, sometimes over it.
Q. Sometimes over it?
A. Yes sir.

By Mr. COWEN:

Q. Did you say you have the requisitions here?
A. No sir, not the requisitions, the sheets are here.

By Mr. COLE:

Q. They are correctly copied on to the sheets as far as you know?
A. When the requisition was sent to my office it was entered in a book and then filed, and the men in making the distribution of cars used that book and then erased it afterwards and kept his regular sheet.
Q. Do you know now of your own knowledge whether those requisitions were filled at all times?
A. No sir.
Q. You do not?
A. They were not.
Q. Do you know why?
A. Well shortage of cars, extreme bad weather, accidents. A great many reasons.
Q. When there were cars on the system unappropriated, were they filled?
A. How is that question?
Q. When you had cars to fill them were they filled?
A. Yes, when we had cars, unless we met with unavoidable accidents, which will happen in extreme bad weather.
Q. Do you know of special orders for cars during that time prevailing.
A. You mean from April, 1902, to January, 1904?
Q. 1902 first?
A. Well yes, there were special orders given to different companies at different times. I wouldn't say they were special orders. As I understood it, they were orders simply given to different companies where people had to have coal in case of emergency, a city was out or something of that kind.
Q. What you mean by special order you may tell me?
A. A special order would be to fill it in preference to other orders, except company coal. You must fill your company coal order first, that is supply coal for the company.

664 Q. Even to the deprivation of other companies of part of their regular order that special order would first be filled?

A. You would with one class of cars, system cars. It wouldn't interfere with other cars that weren't system cars or individual cars.

Q. But with system cars that order took preference before any general distribution was made?

A. Yes sir.

Q. Do you have a recollection about these special orders for Berwind White Coal Mining Company?

A. Yes sir.

Q. You heard these telegrams read here, did you?

A. Yes sir.

Q. State if the orders included in those telegrams were carried out?

A. As far as practicable. There may have been some days we didn't have the number of cars to carry them out too. Our sheets will show that.

Q. Did you carry them out to the extent of what cars you had for that purpose?

A. Yes, unless we met with something that was unavoidable.

By Mr. COWEN: No cross-examination.

* * * * * * *

(COPY OF PLAINTIFF'S EXHIBIT No. 20.)

	Berwind-White.	Puritan mines.
Total capacity in cars of 25 tons each	446720	39148
Total cars received counting steel as two	299509	15969
Percentage of cars received to capacity	67.02 pr. ct.	40.79 per ct.
Total Individual cars received	73853	7050
Total all other cars received	225656	8970
Proportion individual to total all cars rec'd	24.66 pr. ct.	44.20 per ct.
Proportion of tonnage shipped in other than individual cars	75.34 pr. ct.	55.80 per ct.
Proportion borne by individual cars received to total capacity.	16.53 pr. ct.	18.03 per ct.
Proportion borne by cars received (Excluding individual) to total capacity	50.51	22.76 per ct.

665 GEORGE W. CREIGHTON called on part of Defendant, being duly sworn and examined, testified as follows:

By Mr. GOWEN:

Q. What position do you hold with the Pennsylvania Railroad Company?

A. I am General Superintendent of the Eastern Pennsylvaina Division.

Q. And what were you in the years of 1903 and 1904?
A. General Superintendent of the Pennsylvania Railroad Division.
Q. Your headquarters were then and now?
A. Altoona.
Q. You came to Altoona on January 1st, 1903?
A. Yes sir.
Q. Before that you had been where?
A. At Buffalo, in the same capacity.
Q. During the years 1903 and 1904 you were familiar with the fact, were you not, that there were outstanding certain so-called special orders in favor of certain shippers of coal?
A. Yes sir.
Q. And during that period also you had general supervision of the car distribution in the various regions?
A. I did.
Q. Now what was the method and practice that you followed as to the setting apart of cars in order to fill these special orders and what was the effect upon the general distribution of the cars set apart and delivered under these special orders?
A. The custom was first to provide for the company coal shipments. They were taken out of the sum total of the cars that were available. Second, we provided for the special orders, and after that was done the balance of the cars were prorated in accordance with the custom at the time into the different fields and collieries.

* * * * * * *

By Mr. COWEN: It is agreed that the same method was pursued during the nine months of 1902 in dealing with assigned cars, as testified to by Mr. Creighton, was followed during the years 1903 and 1904.

666 [Endorsed:] No. 885. Oct. Term, 1912. Pennsylvania R. R. Co. Plaintiff in Error vs. Puritan Coal Mining Co. Defendant in Error. Præcipe and Transcript of Defendant in Error's Testimony for Printing. Krebs & Liveright, Attorneys-at-law, Clearfield, Pa.

667 [Endorsed:] File No. 23,460. Supreme Court U. S. October term, 1912. Term No. 885. The Pennsylvania Railroad Co., Pl'ff in Error, vs. Puritan Coal Mining Company. Designation by defendant in error of additional parts of record to be printed. Filed May 31, 1913.

Endorsed on cover: File No. 23,460. Pennsylvania Supreme Court. Term No. 398. The Pennsylvania Railroad Company, plaintiff in error, vs. Puritan Coal Mining Company. Filed December 14, 1912. File No. 23,460.

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Supreme Court of the United States.

October Term, 1913. No. 398.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Puritan Coal Mining Company.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was instituted in a State Court of Pennsylvania by the defendant in error, a shipper of bituminous coal from mines located in the State of Pennsylvania, to recover damages claimed to have been sustained because of the alleged failure of the plaintiff in error to allot and deliver to it its proper share of the coal cars which the plaintiff in error had available for distribution in the period of the action.

The defendant in error secured a judgment in its favor in the trial Court, and this was affirmed by the Supreme Court of Pennsylvania.

The issues which are before this Court for review are substantially those raised by the following contentions advanced upon behalf of the plaintiff in error, all of which were overruled by the State Courts:

1. That the plaintiff in error in making distribution of its cars among shippers was subject to the obligations

and prohibitions of the Interstate Commerce Acts and to those alone.

2. That, consequently, if, in making such distribution, it unduly discriminated against the defendant in error, the remedies of the latter were those accorded by the Interstate Commerce Acts, and those alone, and that those remedies did not embrace actions in State Courts to recover damages because of injuries resulting from such discrimination.

3. That if the plaintiff in error in making distribution of its cars was, because of the fact that the cars so distributed could be used by shippers if they so elected for intrastate shipments, subject as to such distribution to a dual control, State and Federal, this State control was exercisable only as to cars for intrastate shipments, and consequently a State statute regulating distribution by carriers of their equipment could have no application to the distribution made by the plaintiff in error in so far as it had to do with cars for interstate shipments, and that cars must be regarded as used for interstate shipments which were consigned by the shipper receiving them to points outside the State in which the shipment originated, even though the title to the lading passed from the shipper to the consignee or purchaser in the other State before the actual movement of the car began.

4. That it was essential to a recovery under the Statute of the State of Pennsylvania under which the present action was brought which prohibited unjust discrimination in the distribution by a carrier of its equipment that it should be shown that under the distribution made by the plaintiff in error the defendant in error had not secured its proper share of cars for intrastate use or shipments.

5. That in ascertaining the number of the plaintiff in error's cars which the defendant in error should have

received, private or individual cars belonging to the latter and which were delivered to it by the plaintiff in error in connection with the distribution made of its own cars should be taken into account.

During the period of the action the plaintiff in error was engaged in transporting bituminous coal from mines in Pennsylvania to points both within and without that State, and the defendant in error was a shipper to points both within and without that State.

To facilitate the distribution of its coal cars among the operators on its lines all of the mines located thereon were given certain ratings based upon their assumed shipping capacity and the distribution of the cars in times of car shortage was, as a rule, made in accordance with these ratings.

In the period of the action, however, which included the period of the great anthracite coal strike of 1902, the distribution of cars in accordance with these ratings was largely departed from, and that actually made was controlled more or less by what were known and are referred to in the testimony as "special orders."

The cars which any shipper received could be used for interstate or for intrastate shipments or for both at the shipper's election, as the plaintiff in error in making distribution of its cars placed no restrictions upon their use, it being left optional with the shippers to whom the cars were delivered as to what use they should make of them.

The defendant in error upon the theory that, having regard to their respective ratings, the Berwind-White Coal Mining Company, another shipper, had been unduly preferred by the plaintiff in error in the distribution of its equipment, instituted the present action. It neither averred by its Statement of Claim that it had been subjected to any other discrimination than that resulting from the alleged undue preference accorded to the Berwind-White Company, nor by its proofs did it

attempt to make out or establish any other discrimination than that alleged in its Statement.

It was established by the evidence, and the trial Court so found, that, having regard to the cars which had been used by the defendant in error and the Berwind-White Coal Mining Company, respectively, for intrastate shipments, the former had received a proportionately larger number of cars, having regard to the respective ratings of their mines, than had the Berwind-White Company.

The trial Judge, however, found that the defendant in error had been subjected to undue discrimination because in his judgment the evidence had shown that the group of mines in which the defendant in error's mines were located had not received as large a percentage of the aggregate ratings of these mines as had the group of mines in which the Berwind-White Coal Mining Company's mines were located.

The plaintiff in error had grouped all of the mines on its road into certain districts or regions. The defendant in error's mines were located in the "Mountain" Region, and the Berwind-White Coal Mining Company's mines in the "Scalp Level" Region, and because it appeared from the records of the plaintiff in error that in the period of the action the cars placed in the Mountain Region were relatively less in number than those placed in the Scalp Level Region, the trial Judge found that the latter region had been unduly preferred to the extent to which it had received cars in excess of the number which it would have received had the percentages of the two regions been relatively equal.

He then found the number of these excess cars which the defendant in error, having regard to the ratings of its mines, would have received had they been allotted to the mines in the two regions and made this the basis of the award in its favor.

In considering whether the mines in the Scalp Level Region had been unduly preferred, the trial Judge took into account all the cars delivered thereat, as well those used for interstate as those used for intrastate shipments.

He excluded, however, from consideration a large number of cars which had been delivered at the mines in both regions including the mine of the defendant in error, these being the private or individual cars of the shippers.

Had the defendant in error received the additional cars which it was found should have been delivered to it, it would have used only about eighteen per cent. of them for shipments to points within the State of Pennsylvania; the balance would have been used for shipments to points without the State. The trial Judge, while holding that the defendant in error was not entitled to recover in respect to cars which would have been used for interstate shipments, nevertheless held that the defendant in error should not be restricted to the damages resulting from the failure to receive the above percentage of the cars which he found it had been unjustly deprived of, because he found that about ninety per cent. of the remaining eighty-two per cent. of such cars would have been used for shipments of coal, title to which, due to the fact that it would have been sold f. o. b. the mines, would have passed from the defendant in error to the purchaser or consignee at the mines. Because of this the trial Judge held that the defendant in error would have made what he regarded as an intrastate use of these cars, notwithstanding the fact that they would have been actually consigned by the defendant in error to points without the State and would have been transported to such points by the plaintiff in error.

The rulings of the trial judge were in the main affirmed by the Supreme Court of Pennsylvania. That Court, however, did not pass upon the correctness of the ruling holding that cars containing coal sold f. o. b. the mines but consigned to points outside the State of Pennsylvania were to be regarded as used for intrastate shipments. It did not pass upon this proposition because it held that it was immaterial whether these cars were used for interstate or intrastate shipments, as in either event the defendant in error was entitled to recover in respect to them.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its dismissal of the petition of the plaintiff in error to dismiss the action for want of jurisdiction of the trial Court to entertain the same.

2. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its refusal to find as requested in the following request presented to it by the plaintiff in error:

> "The plaintiff is not entitled to recover because this Court is without jurisdiction to entertain the cause of action asserted, exclusive jurisdiction over actions of this character having been vested by the Acts of Congress, commonly known as the 'Interstate Commerce Acts,' in the Federal tribunals."

3. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its refusal to find as requested in the following request presented to it by the plaintiff in error:

> "Under the law and the evidence the plaintiff is not entitled to recover."

4. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its affirmance of the following request presented to it by the defendant in error:

> "That shipments by the plaintiff of its product which were sold f. o. b. cars at the mines, upon which the freight was paid by the consignees and destination entirely controlled by the consignees, constituted intrastate business, and not interstate business as between the plaintiff and defendant."

5. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error

	Steel Cars required to make equal with Scalp Level.	Short in Steel Cars.	Short in Cars (Steel as two).	O... in ... re... eq... Sc...
1902.				
April	3106.5	2074.5	4149	
May	3424.5	2277.5	4555	
June	3212	1980	3960	
July	3187.5	1936.5	3873	
Aug	3161	1620	3240	
Sept	2787.5	1493.5	2987	
Oct	2579.5	1353.5	2707	
Nov	2467	1327	2654	
Dec	1989.5	1191.5	2383	
1903.				
Jan	1892	1102	2204	
Feb	2168	1205	2410	
Mar	2921	951	1902	
Apr	2364	976	1952	
May	2009.5	1005.5	2011	
June	2191	853	1706	
July	2192.5	828.5	1657	
Aug	2357.5	768.5	1537	
Sept	2170.5	812.5	1625	
Oct	1783	925	1850	
Nov	2044.5	1031.5	2063	
Dec	2181	1132	2264	
1904.				
Jan	1963	1206	2412	
Feb	2045.5	858.5	1717	
Mar	2237.5	1149.5	2299	
Apr	2643	1636	3272	
May	2600	1331	2662	
June	2056.5	1129.5	2259	
July	2044.5	1268.5	2537	
Aug	1608.5	807.5	1615	
Sept	1449	703	1406	
Oct	1866	1198	2396	
Nov	1577	828	1856	
Dec	1314.5	835.5	1671	
	75604.5	39895.5	79791	

X Short.

Short in Steel Cars.	Short in Cars (Steel as two).	All Other Cars but Ind. required to equalize with Scalp Level.	Long in Other Cars.	Net Shortage in cars (Steel as two).	Net Shortage in tons (Car 25 tons).	Puritan Distribution percentage for month as fixed by Dept.	Shortage in Puritan tonnage on acct. of car shortage.	Average selling price per ton.	Cost of production per ton.	Loss per ton.	Total Loss.	Loss on Penna. Delivery (per cent.).	Loss on Interstate Delivery (per cent.).	Total Loss Penna. Delivery.	Total Loss Interstate Delivery.
2074.5	4149	2548	1207	2942	73550	8.2	6031.1	1.17	1.10	.07	422.18	78.23	21.77	330.27	91.91
2277.5	4555	2745	1084	3471	86775	8.1	7028.7	1.30	1.10	.20	1405.74	75.21	24.79	1057.26	348.48
1980	3960	3024	1038	2922	73050	8.1	5917.4	1.86	1.10	.76	4497.22	80.25	19.75	3609.02	888.20
1936.5	3873	3074	1545	2328	58200	8.1	4714.2	1.72	1.10	.62	3062.80	85.14	14.86	2607.67	455.13
1620	3240	3085	703	2537	63425	8.1	5137.4	1.47	1.10	.37	1900.84	88.86	11.14	1689.09	211.75
1493.5	2987	3099	627	2360	59000	7.8	4602	1.69	1.10	.59	2715.18	81.88	18.12	2223.19	491.99
1353.5	2707	2705	429	2278	56950	7.8	4442.1	2.54	1.10	1.44	6396.62	86.79	13.21	5551.63	844.99
1327	2654	2058.5	599.5	2054.5	51362.5	7.6	3903.5	2.28	1.10	1.18	4606.13	86.93	13.07	4004.11	602.02
1191.5	2383	2081.5	642.5	1740.5	43512.5	9.5	4133.6	2.80	1.10	1.70	7027.12	91.05	8.95	6398.19	628.93
1102	2204	1995	464	1740	43500	9.7	4219.5	3.22	1.10	2.12	8945.34	92.27	7.73	8253.96	691.38
1205	2410	1586	91	2319	57975	9.6	5565.6	2.09	1.10	.99	5509.94	88.46	11.54	4874.09	635.85
951	1902	2337.5	713.5	1188.5	29712.5	9.5	2822.6	1.59	1.10	.49	1383.07	87.95	12.05	1216.41	166.66
976	1952	2025.5	62.5	1889.5	47237.5	9.7	4582	1.57	1.15	.42	1924.44	91.98	8.11	1768.37	156.07
1005.5	2011	2089.5	734.5	1276.5	21912.5	8.5	2712.5	1.52	1.15	.37	1003.63	94.97	5.13	952.14	51.49
853	1706	1933.5	750.5	955.5	23887.5	8.5	2030.4	1.53	1.15	.38	771.55	90.64	9.36	699.33	72.22
828.5	1657	1713	766	891	22275	8.5	1893.3	1.55	1.15	.40	757.32	96.39	2.61	729.98	27.34
768.5	1537	1250	625	912	22800	8.5	1938.0	1.50	1.15	.35	678.30	87.73	12.27	595.07	83.23
812.5	1625	1310.5	690.5	934.5	23362.5	6.0	1401.7	1.50	1.15	.35	490.60	86.86	13.14	426.14	64.46
925	1850	1565.5	861.5	988.5	24712.5	5.7	1408.6	1.46	1.15	.31	436.67	85.90	14.10	375.10	61.57
1031.5	2063	1440	676	1387	34675	6.0	2080.5	1.48	1.15	.33	686.57	90.06	9.94	618.33	68.24
1132	2264	2069.5	743.5	1520.5	38012.5	6.0	2280.7	1.44	1.15	.29	661.40	93.97	6.03	621.52	39.88
1206	2412	1345	710	1702	42550	6.0	2553	1.43	1.15	.28	714.84	87.67	12.33	626.70	88.14
858.5	1717	1301	907	810	20250	6.0	1215	1.41	1.15	.26	315.90	73.88	26.12	233.39	82.51
1149.5	2299	2012.5	1022.5	1276.5	31912.5	6.0	1914.7	1.43	1.15	.28	536.12	81.15	18.85	435.05	101.06
1636	3272	1536.5	612.5	2659.5	66487.5	6.0	3989.2	1.31	1.15	.16	638.27	83.94	16.06	535.76	102.51
1331	2662	1649	122	2540	63500	6.9	3746.5	.....	.....	.....	.....	81.79	18.21		
1129.5	2259	1217	383	1876	46900	6.9	2777.1	.....	.....	.....	.....	93.89	6.11		
1268.5	2537	1351	851	1986	49650	5.6	2780.4	.....	.....	.....	.....	95.93	4.07		
807.5	1615	1847.5	230.5	1384.5	34612.5	5.6	1938.3	.....	.....	.....	.....	88.46	11.54		
703	1406	1901	115	1293	32325	5.6	1810.5	1.23	1.12	.11	199.12	80.95	190.05	161.19	37.93
1198	2396	1771	437	1959	48975	5.6	2742.6	1.23	1.12	.11	301.68	90.59	9.49	273.06	28.63
828	1856	1648.5	202.5	1653.5	41337.5	5.6	2314.9	1.23	1.12	.11	254.64	73.72	26.28	187.72	66.92
835.5	1671	1534.5	X(56.5)	1727.5	43187.5	5.6	2418.5	1.23	1.12	.11	266.04	80.48	19.52	204.11	51.93
39895.5	79791	64850	20344.5	59503.0	1487573.0	.....	109045.4	.....	.....	.....	58509.27	.....	.....	51257.85	7251.42

of the trial Court its affirmance of the following request presented to it by the defendant in error:

> "If by virtue of the undue and unreasonable discrimination practiced in this case the plaintiff suffered damage at the hands of the defendant, it is entitled to recover in this action on the amount of coal it could have sold and would have been able to ship delivered f. o. b. cars at mines, but for the said discrimination of the defendant."

6. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its refusal to find as requested in the following request presented to it by the plaintiff in error:

> "As it appears from the evidence that the cars used by the plaintiff for its State shipments for deliveries of coal during the period of the action constituted a greater percentage of its mine rating than did the cars so used by the Berwind-White Coal Mining Company, the defendant has not been shown by the evidence to have been guilty of any unlawful discrimination cognizable in this action."

7. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its failure to take into account the private or individual cars, so-called, which were delivered to the defendant in error during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the Court found should have been allotted to the region or district in which the defendant in error's mines were located.

8. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court the method adopted by it for ascertaining the number of cars which the defendant in error should have received, which said method is embodied in the following schedule prepared by the Court:

9. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its finding that the plaintiff had sustained damages exclusive of those resulting from delay to the amount of $51,257.85.

10. The Supreme Court of Pennsylvania erred in dismissing the assignment of error which alleged as error of the trial Court its finding that the plaintiff was entitled to a judgment for the sum of $74,323.88.

ARGUMENT.

In this case, by agreement of the parties, a jury was waived, and the trial judge found the facts as well as determined the law applicable thereto. The agreement of waiver will be found at page 25 of the Transcript of Record.

While many of the findings of fact necessary to support the judgment which was rendered in favor of the defendant in error were, in our opinion, not warranted or supported by the testimony, we are not asking this Court to review the correctness of any of these findings. For the purposes of the case we shall treat them as correct, and shall rely wholly upon the legal propositions which arise thereunder.

While these issues have been referred to in the Statement of the Case we shall for convenience of reference restate them here. They are these:—

1. That the plaintiff in error in making distribution of its cars among shippers was subject to the obligations and prohibitions of the Interstate Commerce Acts and to those alone.

2. That consequently if, in making such distribution, it unduly discriminated against the defendant in error, the remedies of the latter were those accorded by the Inter-

state Commerce Acts, and those alone, and that these remedies did not embrace actions in State Courts to recover damages because of injuries resulting from such discrimination.

3. That if the plaintiff in error in making distribution of its cars was, because of the fact that the cars so distributed could be used by shippers if they so elected for intrastate shipments, subject as to such distribution to a dual control, State and Federal, this State control was exercisable only as to cars for intrastate shipments, and consequently a State statute regulating distribution by carriers of their equipment could have no application to the distribution made by the plaintiff in error in so far as it had to do with cars for interstate shipments, and that cars must be regarded as used for interstate shipments which were consigned by the shipper receiving them to points outside the State in which the shipment originated, even though the title to the lading passed from the shipper to the consignee or purchaser in the other State before the actual movement of the car began.

4. That it was essential to a recovery under the Statute of the State of Pennsylvania under which the present action was brought which prohibited unjust discrimination in the distribution by a carrier of its equipment that it should be shown that under the distribution made by the plaintiff in error the defendant in error had not secured its proper share of cars for intrastate use or shipments.

5. That in ascertaining the number of the plaintiff in error's cars which the defendant in error should have received, private or individual cars belonging to it and which were delivered to it by the plaintiff in error in connection with the distribution made of its own cars should be taken into account.

We shall deal with these propositions in the order in which they are stated.

1. THE PLAINTIFF IN ERROR IN MAKING DISTRIBUTION OF ITS CARS AMONG SHIPPERS WAS SUBJECT TO THE OBLIGATIONS AND PROHIBITIONS OF THE INTERSTATE COMMERCE ACTS, AND TO THOSE ALONE.

Among other requests for findings of fact presented to the trial Judge on behalf of the plaintiff in error and affirmed by him was this:—

> "22. The lines of railroad operated by the defendant extend beyond the limits of the State of Pennsylvania. It is engaged in interstate commerce both over its own lines and in conjunction with railroads whose lines connect with it. The bituminous coal which is transported by it is transported from mines located in the State of Pennsylvania to points both within and without the State." (Transcript of Record, page 63.)

It is clear, therefore, that the plaintiff in error was subject to the provisions of the Interstate Commerce Act in respect to the bituminous coal traffic transported by it, and that consequently the obligations and prohibitions embodied in Section 3 of the Act were applicable to it and to the bituminous coal traffic transported in interstate commerce over its lines.

Section 3 of the Act provides as follows:—

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

That the obligations and prohibitions of this Section extend to and embrace the distribution by carriers of

their cars when these are to be used as instrumentalities of interstate transportation or commerce is no longer a disputable proposition, in view of the decisions of this Court.

In Interstate Commerce Commission *vs.* Illinois Central Railroad Company, 215 U. S., 452, Mr. Chief Justice White, referring to an order made by the Interstate Commerce Commission regulating the manner in which cars should be distributed by the Railroad Company, said:

> "It is beyond controversy that the subject with which the order dealt was within the sweeping provisions of Section 3 of the Act to regulate commerce prohibiting preferences and discriminations."

And in Morrisdale Coal Company *vs.* Pennsylvania Railroad Company, 230 U. S., 304, Mr. Justice Lamar, delivering the opinion of the Court, said:—

> "The provisions of Section 3 of the Interstate Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preferences."

In both of these cases, as well as in Baltimore & Ohio Railroad Company *vs.* United States, *ex rel.* Pitcairn Coal Company, 215 U. S., 481, this Court held that by Section 3 the Congress of the United States had dealt with the subject of car distribution by carriers subject to the Act, and had prohibited discriminations and preferences in connection therewith.

Treating, then, as no longer disputable the proposition that Congress has prohibited undue or unlawful discriminations and preferences by a carrier in the distribution of its equipment, at least when this is to be used for interstate transportation, there remains for consideration the question whether any Act of a State imposing like prohibitions, whether enacted prior or subsequent to the enactment of Section 3 of the Interstate Commerce Act,

can have any operative effect or force, for one of the propositions which we urged upon the Court below, and upon which we rely in this Court, is that State Acts of such a character can have no operative force because Congress by the enactment of Section 3 has occupied the field.

And were it not for the contrary view taken and acted upon by the Supreme Court of Pennsylvania in this case, we should have said that the proposition that such State Acts were rendered nugatory and of no effect by the enactment of Section 3 of the Interstate Commerce Act, at least to the extent to which they undertook to prohibit discriminations and preferences affecting cars for interstate use, was indisputable, in view of the decisions of this Court, as to the effect of the enactment of the Interstate Commerce Act upon the power of States to regulate subjects with which it dealt.

In the present case, however, the defendant in error has been permitted to secure a judgment upon the theory that the following statute of the State of Pennsylvania was unaffected by the enactment of Section 3 of the Interstate Commerce Act, and was consequently operative, not merely as to cars intended for intrastate use, but to cars intended for interstate use as well.

The statute, omitting Section 3, which has no application to the present case, provides as follows:—

> "SECTION 1. That any undue or unreasonable discrimination by any railroad company or other common carrier, or any officer, superintendent, manager, or agent thereof, in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State is hereby declared to be unlawful.
>
> "SECTION 2. No railroad company or other common carrier engaged in the transportation of property shall charge, demand, or receive from any person, company, or corporation, for the transportation of property, or for any other service, a greater sum

than it shall charge or receive from any other person, company, or corporation for a like service, from the same place, upon like conditions, and under similar circumstances, and all concessions in rates and drawbacks shall be allowed to all persons, companies, or corporations alike, for such transportations and service, upon like conditions, under similar circumstances, and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals, or between individuals and transportation companies, or (in) the furnishing of facilities for transportation. Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered." (P. L., 1883, page 72.)

In the trial Court the proposition that this Act of the State of Pennsylvania upon which the defendant in error rested its right to recover could be treated as applicable to cars which if received would have been used for interstate shipments was not urged nor relied upon by the defendant in error, but a recovery was sought only in respect to cars which it contended would have been used for intrastate shipments.

It is difficult to determine from the trial Judge's discussion of the question whether he regarded this Pennsylvania statute as unaffected to any extent by the enactment of Section 3 of the Interstate Commerce Act, or whether he regarded it after such enactment as still effective but applicable so far as it dealt with the feature of car distribution, to distribution affecting or having to do only with cars for intrastate use. In one part of his opinion, he appears to hold that the statute was not affected or abrogated in any respect by the enactment of the Interstate Commerce Act for reasons which he thus states:—

"The whole tenor of the authorities, when a conflict between the state and federal statutes is in

> question, seems to indicate that where a state statute is enacted in execution of a reserved power of the state, such statute is not held to be inconsistent with an Act of Congress passed in execution of a clear power under the Federal Constitution, unless the repugnance is so direct and positive that the two acts cannot be reconciled or stand together. The test is whether Congress has provided a different measure of liability." (Transcript of Record, page 71).

But in his final disposition of the contention which questioned the jurisdiction of the State Court, the trial Judge held that the jurisdiction could be sustained because the defendant in error in his view had confined its claim to the damages which it alleged it had sustained, due to the non-receipt by it of so many of the cars which it claimed it ought to have received as would have been used by it for what it asserted would have been intrastate shipments.

The Supreme Court of the State did not, however, as its opinion indicates, sustain the jurisdiction upon the ground that the defendant in error had recovered only in respect to cars which would have been put to an intrastate use. It sustained the jurisdiction upon the broader ground that, conceding that the use would have been an interstate use and that what was complained of constituted a violation of Section 3 of the Interstate Commerce Act, this consideration did not in anywise operate to confine the defendant in error to the remedies afforded by the Interstate Commerce Act, but that it was free to proceed in the state courts for violation of the state statute to which we have already referred.

That this was the view of the Court is evident from the following extracts from its opinion:—

> "If the case was with the plaintiff on its facts—and it is so found—then we have an offense threefold in character: *First*, an offense against common

law; *second*, an offense against the Federal statute regulating interstate commerce, which by the third section provides that it shall be unlawful for any common carrier subject to its provisions, 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any way whatsoever, or to subject any particular person, company, firm, corporation, or any locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever'; and, *third*, an offense against our own State statute of June 4, 1883, P. L. 72, which declares that 'any undue or unreasonable discrimination by any railroad company, or other common carrier * * * in charge for or in facilities for, the transportation of freight within the State, or coming from or going to any other State,' shall be unlawful. For injury so sustained to what tribunal may the injured party look for redress? Are the courts of his own State closed against him, and must his only recourse be to a Federal tribunal?" (Transcript of Record, page 113.)

The Court then considers certain decisions of this Court which it conceived had a bearing upon the question which it had propounded, and states the conclusion which it derives therefrom as follows:—

"We derive from this opinion these inevitable conclusions: (1) that where Congress prescribes a particular act, not in itself an offense at common law, jurisdiction with relation thereto attaches to the Federal courts; (2) where the act is an offense at common law, and made so as well by State statute, in such case, except as other reasons may be shown, there is concurrent jurisdiction of it in the State courts; (3) that the Interstate Commerce Act does

not attempt any more than does the common law to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission; (4) that when this commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress had specially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offense to the Federal tribunal; (5) that except as to the thing the Commission has defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the State courts according to their own statute, or the common law as the case may be." (Transcript of Record, page 115.)

The Court then proceeded to consider whether any action had been taken by the Interstate Commerce Commission of a character to make effective the view embodied in sub-division 4 of those above enumerated and after referring to the action of the Commission which was made the subject of review by this Court in the case of Interstate Commerce Commission *vs.* Illinois Central Railroad Company, 215 U. S., 452, and the character of the order made by the Commission, the Court continued as follows:—

"It is impossible to conceive of any local or other conditions which would prevent such order with respect to the fuel cars of the carrier from operating generally with the same measure of justice and equity to all, and hence we conclude that not only does the rule announced govern in the regulation of the Illinois Central Railroad Company, but that it applies to and governs, upon the authority of the cases above cited, all railroads; that it is as much the law of the land as though written in the lines of the Interstate Commerce Act, and that having been

legislated upon by the commission exclusive jurisdiction with respect thereto vests in the Federal Tribunal." (Transcript of Record page 118.)

The Court then refers to the fact that the determination of the issue of discrimination involved in the present case did not, in its opinion, require consideration of any order of the Commission, because it did not appear that the Commission had made any order regulating the manner in which the plaintiff in error should distribute its coal cars:—

"There is nothing of that kind here," said the Court; "nothing but a case of discrimination pure and simple; not a specific offense created by the express terms of the Federal statute, not an offense against any order of the Commerce Commission; but an offense which could fall within the Federal statute and the common law as well and so be held to have been legislated upon by Congress, only as the Interstate Commerce Commission has so declared. Our own State statute rests for its authority on the police power of the State, and its sole object is to prohibit common carriers which derive all their powers from the State, and have been granted these to the end that they may serve public necessity and convenience, from practicing undue and unreasonable discrimination between shippers in the service they are created to render. The exercise of this power in the way indicated is not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of. The thing condemned by our State statute and by the common law was a purely incidental matter indirectly affecting interstate commerce, just as was the discrimination in the case of the Missouri Pacific Ry. Co. *vs.* Larabee Flour Mills, 211 U. S., 612. The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in

> holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed. It was not a question in the case whether the cars denied the plaintiff were intended for shipment within the State or beyond. It was sufficient that the offense was committed within the State." (Transcript of Record, page 118.)

It thus appears that the Supreme Court of Pennsylvania considered that it was immaterial whether the cars in respect to which the plaintiff had recovered "were intended for shipment within the State or beyond." In either case, in its view the State Act was applicable, and consequently the action in the State Court was justified because the exercise of State power is, as the Court put it, "not interfered with by the Interstate Commerce Act in the absence of action by the Commerce Commission specifically directed against the particular matter complained of."

Certainly no other inference is possible from what was said by the Court in the extracts above quoted than that State legislation and State power were not in any wise affected by the enactment of Section 3 of the Interstate Commerce Act, and that they would not be affected as to any one carrier unless and until the Interstate Commerce Commission had made an order specifically prescribing what should be done by that particular carrier in order to comply with the provisions of the Section.

But Section 3 of the Interstate Commerce Act affirmatively prohibits preferences and discriminations in the distribution by a carrier of its equipment, and while it is true that, under other provisions of the Interstate Commerce Act, the administrative duty of determining what rules or regulations a carrier must prescribe and enforce in order to conform to the requirements of the Section is devolved upon the Interstate Commerce Commission, it is difficult to understand the argument which would deduce from this consideration the conclusion that Congress, because it had not itself prescribed

what carriers must do in order to avoid the discriminations and preferences prohibited by the Section, but had largely devolved this duty upon the Commission created by the Act, had not by its legislation so occupied the field as to exclude therefrom all State enactments and action. If this result would have followed if Congress had itself laid down rules for the carriers' guidance and observance, why does it not equally follow when Congress creates a body, viz., the Interstate Commerce Commission, to prescribe such rules? The field of legislation, so far as the States are concerned, is as fully occupied by Congress in the one case as in the other, for it would seem to be wholly immaterial whether Congress itself prescribed the rules which carriers must observe or created a Commission to prescribe such rules. In both cases Congress has legislated and its scheme of legislation neither contemplates nor permits State control or interference.

What was said by the Court in its opinion in the present case left somewhat doubtful the question as to the character of the action that would have to be taken by the Interstate Commerce Commission in order to make effective exclusive Federal control. Some action of the Commission was in its opinion necessary, so much is clear. But from later decisions which are before this Court for review, it is possible to determine what action of the Commission in the Court's opinion was requisite. These later decisions were rendered in the cases of Stineman Coal Mining Company *vs.* Pennsylvania Railroad Company, 241 Pa. St. Rep., 509, and Clark Brothers Coal Mining Company *vs.* Pennsylvania Railroad Company, 241 Pa. St. Rep., 515. In the former of these cases the Supreme Court of Pennsylvania held that Section 3 of the Act though supplemented by orders of the Interstate Commerce Commission prescribing the method or system of distribution to be followed by common carriers did not prevent a recovery by a shipper under the Pennsylvania statute above quoted if such orders had not been in force during the period of the action, and that in determining whether the carrier had been guilty of discrimination for-

bidden by the statute, the rights of the shipper were not to be measured by or ascertained with reference to the system of distribution which the Commission had in such orders prescribed as proper.

And in the second of these cases—Clark Brothers Coal Mining Company *vs.* Pennsylvania Railroad Company—this doctrine was further extended, and a shipper was held entitled to recover under the Pennsylvania statute, notwithstanding the fact that this same shipper had proceeded before the Interstate Commerce Commission, had secured an order which defined the system of distribution which in the judgment of the Commission should have been pursued by the carrier in the period of the action, and had further claimed and secured an award of damages because the carrier had not in the period of the action conformed to the method of distribution prescribed as proper by the Commission.

It would appear, therefore, from these decisions that the view which has governed the Supreme Court of Pennsylvania is that State control over the distribution by a carrier of its equipment, though this is to be used in interstate transportation or commerce, is not affected until the Interstate Commerce Commission has assumed direct control thereover by putting the carrier under the compulsion of an order defining and directing what method of distribution should be pursued. Apparently the Court's view is that the general prohibitions against discrimination and preference contained in Section 3 of the Interstate Commerce Act require action by the Commission to make them affirmatively operative against a carrier. But how it can reconcile this view with the effect which it has given in the present and the other cases to which we have referred, to the general prohibitions against discrimination contained in the Pennsylvania Statute is not apparent. It has treated these latter as affirmatively operative; why should it treat those of Section 3 differently?

As was said by the Supreme Court of Pennsylvania itself in its opinion in this case, Congress "committed to the Interstate Commerce Commission the *task of definition,*" and when the Commission has acted and

has properly interpreted the provisions of the Interstate Commerce Act, then such interpretation becomes, to quote again from the Court's opinion, "as much the law of the land as though written in the lines of the Interstate Commerce Act," but not because the Commission has added to or enlarged or amended the legislation of Congress, but solely because it has interpreted the same, and applied it to a given state of facts. But upon what theory can it be justly claimed that by the mere act of interpreting the legislation of Congress the Commission has added to its legal force and effect?

But really further consideration of the proposition we are considering has been rendered unnecessary by the decisions of this Court which have considered and dealt with the effect upon the power of the States to legislate in respect to the same matters which Congress by the enactment of the Interstate Commerce Act has dealt with. There have been many decisions dealing with this subject. We should not be justified in referring to all of them, but shall only call attention to a few.

In Southern Railway Company *vs.* Reid, 222 U. S., 424, Mr. Justice McKenna, speaking for the Court, puts this inquiry:—

> "Does it (*i. e.*, the Interstate Commerce Act) take control of the subject matter and impose affirmative duties upon carriers which the *State cannot even supplement?* In other words, has Congress taken possession of the field?"

This inquiry he thus answers:—

> "There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of State authority are not employed, but the subject is taken possession of."

In Chicago &c., Railway Company *vs.* Hardwick Farmers Elevator Company, 226 U. S., 426, the question involved was whether the provision of the Hepburn Amendment of 1906 requiring carriers to provide and

furnish cars upon reasonable request therefor abrogated State legislation of the same character. The Chief Justice, delivering the opinion of the Court, said:—

> "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred (*i. e.*, passage of the Hepburn Amendment) *that the power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme.*"

In Yazoo & Mississippi Valley Railroad Company *vs.* Greenwood Grocery Company, 227 U. S., 1, the grocery company had been permitted in an action brought against it in a State Court by the Railroad Company to recover demurrage claimed to be due by it, to offset against this claim certain penalties claimed to have accrued under State regulations because of delays in delivering certain cars to the grocery company in completion of interstate transportation.

Some of these penalties had been incurred after June 29th, 1906.

The State Court had allowed the offset, but its action in this regard was held by this Court to have been erroneous. As to the penalties accruing after June 29th, 1906, the Court held, to quote from the syllabus of the case:—

> "Since Congress has acted by passing the Hepburn Act of June 29th, 1906, in regard to delivery of cars for interstate shipments, all State legislation on that subject has been superseded."

If an Act of Congress regulating the delivery of cars for interstate shipments necessarily superseded all State legislation on the subject, the same result, we submit, must follow the enactment of an act prohibiting preferences and discrimination in the allotment and delivery of cars for interstate shipments.

In Barrett *vs.* City of New York, decided January 5th, 1914, and not yet reported in the regular reports, this Court held that an ordinance of the City of New York which required, *inter alia*, express companies to give bond conditioned for the safe carriage and delivery of shipments was invalid because Congress by the Interstate Commerce Acts had completely occupied the field:—

> "As applied to the Company's business of interstate transportation," said Mr. Justice Hughes, delivering the opinion of the Court, " * * * it (*i. e.*, the ordinance) must be regarded as repugnant to the exclusive control asserted by Congress in occupying the field of regulation with regard to the obligations to be assumed by interstate express carriers."

And in Railroad Commission of Ohio *vs.* Worthington, 225 U. S., 101, this Court held that whether transportation was of such a character as to be within the jurisdiction and control of the Interstate Commerce Commission was immaterial to the determination of the question of the existence of state control thereover. If it was interstate in character, then the mere enactment of the Interstate Commerce Act had effectively put an end to state control.

But further citation of authorities to sustain the proposition under consideration would not be warranted.

The Supreme Court of Pennsylvania, as its opinion indicates, considered that the decision of this Court in the case of the Missouri Pacific Railway Company *vs.* Larabee Mills, 211 U. S., 612, justified the conclusion

which it reached as to the continued applicability of the Pennsylvania Statute of 1883, notwithstanding the enactment by Congress of the Interstate Commerce Act.

But the decision in the Larabee case, we submit, affords no justification for this view.

In that case the question was whether a State Court could compel a railroad company to switch cars of another company, some of which were intended for interstate shipments.

It was admitted by those who challenged the power of the State Court that Congress by the enactment of the Interstate Commerce Act had not directly legislated in respect to the particular matter which was before the Court, but it was nevertheless contended that the enactment of that Act had had such an effect.

This Court refused to sustain this view or contention upon the ground that the matter which the State Court had dealt with was one which only incidentally affected interstate commerce, but that the Court did not intend to hold that State control or power over these merely incidental matters continued after Congress had directly legislated in respect thereto is apparent from what was said by it:—

> "Running through the entire argument of counsel for the Missouri Pacific," said Mr. Justice Brewer, "is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. *Until specific action by Congress or the Commission the control of the state over these incidental matters remains undisturbed.*"

There was thus a clear recognition of the doctrine or view that when Congress takes specific action it thereby removes from State control even those matters which have merely an incidental relation to interstate com-

merce. That specific action has been taken by Congress in respect to the matter with which we are concerned in the present case, viz., discrimination and preference by a carrier in the distribution of its equipment, we trust we have demonstrated, and that this matter is something more than an incident of interstate commerce will hardly be denied in view of the fact that one of the main purposes of the enactment of the Interstate Commerce Act by Congress was to do away with discriminations and preferences of such a character.

In the case of Interstate Commerce Commission *vs.* Illinois Central Railroad Company, 215 U. S., 452, this Court, in disposing of a contention advanced upon behalf of the Railroad Company that the Interstate Commerce Commission had not been empowered to make orders regulating the method to be pursued by a carrier in distributing its equipment, said:—

> "In addition to adopt it would require us to hold that Congress in enlarging the power of the Commission over rates had so drafted the amendment as to cripple and paralyze its *power in correcting abuses as to preferences and discriminations which, as this Court has hitherto pointed out, it was the great and fundamental purpose of Congress to further.*" (Page 477.)

No similarity whatever, therefore, exists between the Larabee case and the present one. In the former, as this Court found, no specific and direct action of Congress was involved; in the present case we have specific and direct action of Congress and action which was designed to accomplish what this Court has designated as the "great and fundamental purpose of Congress," in the enactment of the Interstate Commerce Act.

We have thus far considered the question whether Section 3 of the Interstate Commerce Act exclusively controls a distribution by a carrier of its cars for interstate shipments. If it does, the judgment in the present

case, we conceive, would necessarily have to be reversed because, as we shall point out later on, there is included therein damages sustained because of the failure of the plaintiff in error to deliver cars which if received would have been used by the defendant in error for interstate shipments.

But not only we submit does Section 3 of the Interstate Commerce Act regulate to the exclusion of State regulation the distribution of cars for interstate shipments or use, but it also under the circumstances under which the plaintiff in error made allotment and distribution of its cars controlled to the exclusion of State regulation the distribution of its coal car equipment as an entirety.

The trial Judge affirmed the following requests for findings of fact presented upon behalf of the defendant in error:—

> "5. That according to a system recognized by the defendant company and also by the various shippers of coal along its line, the mines of the different operators were rated according to their capacity to produce coal, which rating was for the purpose of determining the percentage or *pro rata* of cars or facilities that should be furnished to the various operators for the purpose of loading or shipping their product, and said rating was fixed by the defendant company." (Transcript of Record, page 44.)

> "4. That in the operation of the business of the plaintiff company and also of the Berwind White Coal Mining Company cars were ordered as required from said defendant company without respect to the uses to which said cars were to be put, except that they were for the loading and transportation of coal." (Transcript of Record, page 44.)

And also the following request presented upon behalf f the plaintiff in error:—

> "23. The defendant in making distribution of its coal cars during the period of the action did not

make one distribution for state shipments, and a separate or distinct one for interstate shipments. It made but one distribution and imposed no restriction as to their use upon the operator to whom the cars were delivered, leaving it open to him to use the cars either for State or for interstate shipment, as he might elect." (Transcript of Record, page 63.)

In one of the latest cases—Minnesota Rate Cases, 230 U. S., 352—in which this Court has had occasion to consider the extent of the limitations upon the exercise of State authority when interstate commerce was affected or involved, one of the rules which the Court regarded as settled by its previous decisions was thus stated by Mr. Justice Hughes (page 399):—

> "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its Constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the National power within its appointed sphere.*"

Was, then, the distribution made by plaintiff in error of cars for intrastate shipments so interwoven with the distribution for interstate shipments that the effective control or direction of the latter by the Federal authority must incidentally control the former also?

The act of allotment and distribution was a single and indivisible act, and we submit that in the performance

of this act the plaintiff in error could not *ex necessitate rei* be subject to the regulatory control of both State and Federal authorities.

In the case of Baltimore & Ohio Railroad Company *vs.* United States, *ex rel.* Pitcairn Coal Company, 215 U. S., 481, this Court pointed out the inextricable difficulties that would follow an attempt to have determined by two separate tribunals—in that case the Federal Courts and the Interstate Commerce Commission—the proper ratings of mines for purposes of car distribution, and the same reasons which induced the conclusion in that case that the determination of what was a proper method of rating must be confided to but one body or tribunal apply not merely equally, but with far greater force when the question to be determined is whether a dual control of the subject of ratings, by the State and the Nation, is practicable.

And in the case of Interstate Commerce Commission *vs.* Illinois Central Railroad Company, 215 U. S., 452, this Court also pointed out the necessity of single control and the impracticability of dual control over the feature of car allotment as well as of mine ratings.

> "It is disclosed," said Chief Justice White, delivering the opinion of the Court, "that the railroads of the United States, generally, at various times, put in force regulations for the distribution of coal cars. Generally speaking, these regulations provide for fixing the capacity of coal mines in order to determine the number of cars to which each might normally be entitled to daily move its output of coal. And these regulations also provide for a method of determining the *pro rata* share of the cars daily alloted for distribution in times of car shortage. Neither the method by which capacity was to be ascertained nor the regulation for daily distribution upon the basis of such capacity in case of shortage was identical among the various railroad systems of the United States. The divergence and even conflict, between those systems is illustrated by the cases of

Logan Coal Co. *vs.* Pennsylvania R. R. Co., 154 Fed. Rep., 497; United States *ex rel.* Pitcairn Coal Co. *vs.* B. & O. R. R. Co., 165 Fed. Rep., 113; cases cited at pages 503 and 504 of the report of the Logan Coal Co. case, and the case of Majestic Coal & Coke Co. *vs.* Illinois Central R. R. Co., 162 Fed. Rep., 810.

"In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines, or in order to determine the *pro rata* share for daily distribution of cars to the respective mines in case of shortage dealt with four classes of cars: 1, system cars, that is, cars owned by the carrier and in use for the transportation of coal; 2, company fuel cars, that is, cars belonging to the company and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier and was used solely for its own fuel purposes; 3, private cars, that is, cars either owned by coal mining companies or shippers or consumers, and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; 4, foreign railway fuel cars, that is, cars owned by other railroad companies and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies.

"The various regulations, irrespective of minor differences between them, fell upon one or the other side of this broad line of division. One system took into account class 2, the fuel cars of the carrier, class 3, the private cars, and class 4, the cars of foreign railroads, and deducted from the rated capacity of the mine the sum of coal delivered by that line in such cars, and upon the basis thus resulting apportioned ratably in case of shortage the system cars, that is, those embraced in class 1.

> On the other hand the other class of regulation not only took no account of the cars in classes 2, 3 and 4, as a means of rating the capacity of the mine, but, moreover, did not charge against any mine, for the purpose of ascertaining the daily *pro rata* of the cars to which such mine was entitled, any cars whatever furnished such mine on such day embraced within classes 2, 3 and 4, that is, any company fuel car, foreign railway fuel car or private car. By this system, therefore, where a mine was entitled daily to a given *pro rata* of the cars subject to general distribution it received its full share of such cars, and in addition on that day also received such of the company fuel cars, foreign railway fuel cars and private cars as might have been sent to it for loading on that day. This absolute disregard in the allotment of the company fuel cars, foreign railway fuel cars, and private cars was not in all respects common to all the systems which took no account of such cars in fixing capacity, since in some of the regulations one or the other of the classes was taken into account in fixing the *pro rata* for distribution."

And in Morrisdale Coal Co. *vs.* Penna. R. R. Co., 230 U. S., 304, the necessity of single control of the subject of car distribution was again pointed out by this Court.

If a carrier's method of rating mines and alloting cars were to be subjected to both State and Federal control, one of the methods above referred to by the Court might be adopted by the State as the one which would secure the fairest results, while another and a totally different one might be adopted by the Federal authorities. Manifestly both could not be carried out by the carrier, and it would seem necessarily to result from this consideration that the power of control can not exist at the same time in both the State and Nation.

These and other considerations to which it is not worth while to revert clearly demonstrate, we submit, that both State and Federal control and regulation of a carrier's

distribution of its equipment is impossible. The intrastate distribution is not merely interwoven with the interstate distribution, but the two are so firmly interlocked as together to constitute but one act of the carrier, and as a dual control over this one act is not practicable, the Federal control must necessarily prevail.

The present case is analagous to that of Northern Pacific Railway Company *vs.* State of Washington, 222 U. S., 370. There an action had been brought to recover penalties imposed for non-observance by the Railway Company of an Act of the State of Washington regulating the hours of service of railroad employees. The penalties were alleged to have been incurred as the result of operation of a train in which had been hauled both interstate and intrastate cars, and the question involved was whether the State Act had been rendered inoperative as to such train by the Federal hours of service law.

It was conceded that the State Act was justified by the police powers possessed by the State, but it was nevertheless held by this Court that the Federal statute, notwithstanding the fact that the trains involved were made up of both intrastate and interstate cars, was controlling to the exclusion entirely of the State statute.

> "The train," said Mr. Chief Justice White, delivering the opinion of the Court, "although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the state destined to points within the state and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside of the state and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. *In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the Act of Congress was exclusively controlling.*"

In that case in one and the same train interstate and intrastate cars were hauled, but the interstate feature of the train led to the exclusion of state regulation. In the present case by one and the same allotment and distribution interstate and intrastate cars were distributed. Must not the same result follow and state regulation be excluded?

But the question whether Section 3 of the Interstate Commerce Act is exclusively applicable to the act of the plaintiff in error in distributing its equipment is, we think, answered in the affirmative by what was said and done by this Court in the case of Illinois Central Railroad Company *vs.* Interstate Commerce Commission 215 U. S., 452.

In that case the Court was called upon to determine whether a certain order made by the Interstate Commerce Commission was a valid and lawful one. This order had been made by the Commission in a proceeding instituted before it by certain coal operators on the line of the Illinois Central Railroad Company, who alleged that the system pursued by that company in the distribution of its coal cars in times of shortage was an unfair and unjust one. It appeared that under this system, the railroad company did not count at all as against the mines receiving them cars which it placed at such mines to be loaded with its own fuel coal. Under the terms of purchase of this fuel coal the title to the coal passed from the operator to the railroad company simultaneously with its delivery in the cars at the mines, and the contention was advanced that inasmuch as the cars after being loaded were moved from the mines not for account of the operator, but for account of the railroad company, which was then the owner of the coal, such subsequent movement of the cars and transportation of the coal should not be treated or regarded as connected with or having to do with any commerce, much less interstate commerce, and that consequently the Railroad Company as to its distribution of these cars was not subject to the obligations imposed by the Interstate Commerce Acts.

This contention was overruled by the Commission, which, by its order, defined the manner and the extent to which these cars should be counted as against the mines receiving them. After this order was made, the railroad company instituted a proceeding in the Circuit Court of the United States for the Northern District of Illinois, to have it set aside upon the ground, *inter alia*, that the Commission had no authority to make it. The Circuit Court sustained the railroad company's contention on grounds which are indicated by the following extract from the opinion of that court:—

> "Coal is bought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine-tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.
>
> "Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel."

From the decree entered by the Circuit Court an appeal was taken to this Court, which reversed the decree of the Circuit Court and restored the order of the Commission.

> "It may not be doubted," said Mr. Chief Justice White in delivering the opinion of the Court, "that the equipment of a railroad company engaged in interstate commerce, included in which are its

> coal cars, are instruments of such commerce. From this it necessarily follows that such cars are within the governmental power of regulation which extends in time of car shortage to compelling a just and equal distribution and the prevention of an unjust and discriminatory one." 215 U. S. Rep., page 474.

As the Commission's power is limited to the making of orders designed to enforce compliance with obligations imposed upon railroad companies by the Interstate Commerce Act, the Court's position upholding the right of the Commission to make the order to which we have been referring necessarily assumed we submit that the obligation imposed by Section 3 of the Act extended to the distribution by the Illinois Central Railroad Company of its equipment as a whole, as well that which, for the time being, was employed in interstate transportation, as that which was being put to some other use, or was being employed in intrastate transportation.

This decision was recognized and accepted by the United States Commerce Court as definitely determining that a railroad company engaged in interstate commerce is, in respect to the distribution of its equipment which is used interchangeably for both interstate and intrastate transportation, subject as to all of such equipment to the obligations of the Interstate Commerce Acts.

In Pennsylvania Railroad Company *vs.* Interstate Commerce Commission, 193 Fed. Rep. 81, the plaintiff in error in the present case was attacking orders of the Interstate Commerce Commission regulating the manner in which distribution should be made by it of its coal cars in times of shortage, because among other grounds of objection, the orders covered all cars, as well those which were to be used for intrastate, as those which were to be used for interstate shipments. Dealing with this objection the Commerce Court said:

> "But the petitioner contends that they (*i. e.*, Commission's orders) apply also, or may be con-

strued and enforced by the Commission as applying, to cars for intrastate as well as interstate shipments, and that so construed they are in excess of the Commission's authority, and this appears to be the sole objection upon which petitioner relies.

"Assuming without deciding that the orders in question should be or can be so interpreted, we are nevertheless of opinion that they are within the powers delegated to the Commission. In the course of its business as a common carrier the petitioner transports large quantities of coal to both intrastate and interstate destinations, and its cars are used indiscriminately in this service. The coal operators whose complaints were investigated by the Commission, and at whose instance the orders were made, ship their products to points within or points without the State of Pennsylvania, as market conditions or other trade interests may dictate. A large part of the business is interstate, but it is conducted in its entirety by shipper and carrier alike as a unit of operation with little or no regard to the boundaries of the State in which the traffic originates.

"In view of these facts, which are wholly undisputed, we see no reason to doubt the authority of the Commission to make these orders, even though they are intended to have the application and effect which petitioner appears to apprehend. This conclusion necessarily follows, as we conceive, from the principles so clearly stated and so instructively discussed by Mr. Justice (now Chief Justice) White in Interstate Com. Com'n. *vs.* Illinois Central R. Co. (215 U. S., 452). Indeed, we are unable to find any substantial basis for distinguishing that case from the one at bar."

If this view of the power of the Interstate Commerce Commission be correct—and we believe it is, notwithstanding the fact that the plaintiff in error at one time questioned its correctness—it would necessarily follow, we

submit, that the State Court improperly took cognizance of the cause of action asserted by the defendant in error.

2. IF, IN MAKING DISTRIBUTION, THE PLAINTIFF IN ERROR UNDULY DISCRIMINATED AGAINST THE DEFENDANT IN ERROR, THE REMEDIES OF THE LATTER WERE THOSE ACCORDED BY THE INTERSTATE COMMERCE ACTS, AND THOSE ALONE, AND THOSE REMEDIES DID NOT EMBRACE ACTIONS IN STATE COURTS TO RECOVER DAMAGES BECAUSE OF INJURIES RESULTING FROM SUCH DISCRIMINATION.

If, as we trust we have demonstrated, the plaintiff in error was in respect to its car distribution subject only to the prohibitions against discrimination and preferences embodied in Section 3 of the Interstate Commerce Act, the conclusion, we submit, is inevitable that if it violated or ignored these prohibitions and thereby injured the defendant in error, it did not confer upon the latter a cause of action cognizable by the State Courts.

The Interstate Commerce Act by Sections 8 and 9, provides as follows:—

> "SECTION 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the Court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.
>
> "SECTION 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for

the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district circuit court of the United States of competent jurisdiction. * * *."

Referring to these sections this Court in the case of Chicago, etc., Railway Company *vs.* Hardwick Farmers Elevator Company, 226 U. S., 426, speaking by the Chief Justice, said:—

> "Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to regulate commerce give remedies for the violation of that duty. Thus, by Section 8, it is provided 'that in case any common carrier subject to the provisions of this Act * * * shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this Act.' * * * Further, by Section 9, an election is given to either make complaint to the Interstate Commerce Commission or to bring in a designated court an action for the recovery of damages."

That under the provisions of Section 9 actions for recovery of damages resulting from violation by carriers of obligations imposed upon them by the Interstate Commerce Acts can only be brought in the Federal tribunals referred to therein is the accepted doctrine of the lower Federal Courts.

Northern Pacific Railway Company *vs.* Pacific Coast Lumber Manufacturers Association, 165 Fed. Rep. 1.

Van Patten *vs.* Chicago, Milwaukee & St. Paul Railway Company, 74 Fed. Rep., 981.

Sheldon *vs.* Wabash Railway Company, 105 Fed. Rep., 785.

Since the enactment of Section 9 of the Interstate Commerce Act, Congress has by its amendment of Section 16 conferred concurrent jurisdiction upon State and Federal Courts of actions brought to enforce reparation orders made by the Commission, but save to this extent State Courts have not been authorized to entertain actions growing out of a violation by a carrier of the provisions of the Act.

While it is not necessary to determine whether a Federal Court could without prior action by the Interstate Commerce Commission take cognizance of the cause of action asserted in the present case if the action had been brought because of violations of Section 3 of the Interstate Commerce Act, the case would seem to be one in which the jurisdiction of the Commission would first have to be invoked in order to have determined whether the distribution which was actually made by the plaintiff in error was a proper one, especially in view of the conditions which prevailed throughout a large part of the period covered by the action.

Throughout the greater part of this period the bituminous coal trade and traffic on the lines of the plaintiff in error were affected by the suspension of shipments of anthracite coal due to the long miners' strike which occurred in the year 1902.

The trial Court in its findings of fact thus refers to this condition:—

> "That (owing to the anthracite strike) beginning in the spring of 1902 and continuing the balance of said year 1902 and throughout the year 1903, the bituminous coal trade of Pennsylvania along the lines of the Pennsylvania Railroad was unusually active, and for that reason there was an unusual demand for cars from the defendant company by the coal operators along its lines, and that the defendant company did not have a sufficient car equipment to supply the demand." (Transcript of Record, page 33.)

This is a mild statement of the situation actually existing at that time. What that situation actually was is set forth in a decision of the Interstate Commerce Commission which is reported in 10 I. C. C. Rep., 640—Thompson *vs.* Pennsylvania Railroad Company.

In that proceeding the Commission was required to determine whether the conditions prevailing, due to the anthracite strike, were such as to justify the plaintiff in error in the present case in ignoring or departing from the rules to which under ordinary conditions it would have been subject in respect to the distribution of its coal cars, and the conclusion which the Commission reached is sufficiently indicated by the following extract from its report:—

> "We are not called upon to decide whether railroads may, in the ordinary course of their dealings with shippers, discriminate between tipple and wagon loading cars, as in the Harp Case (118 Fed., 169); or whether, without a rule, they may in an emergency like that of the great coal strike and subsequent car famine discriminate between competing individuals under like conditions by furnishing some and denying others, as in the Glade Coal Company Case recently decided by the Commission (10 I. C. C. Rep., 226). But this point is clear, that under such conditions as prevailed during the period under consideration, with the public clamoring for fuel, with a supply of cars far below the demands from constant patrons, with a freight congestion that taxed the motive power to its limit, the defendant was justified in establishing a rule for that emergency which, justly enforced, was calculated to hasten the movement of this great staple and relieve the distress of a burdened public." (Page 647.)

Under the conditions thus described by the Interstate Commerce Commission distribution of its cars was made

by the plaintiff in error largely through and by what are designated in the testimony as "special orders." To what extent these brought about an unjust inequality of distribution of which any shipper could properly complain is not an issue before this Court. But this at least would seem to be clear, that the conditions then confronting the plaintiff in error were such as to warrant it in establishing a rule for the emergency which was best calculated to secure the movement to market of the largest possible volume of coal.

What this rule should have been is of course an administrative question which it would seem as between the Federal Courts and the Interstate Commerce Commission the latter would primarily have to determine.

In the present case the defendant in error has secured a judgment upon the theory that in the period to which we have just referred, the plaintiff in error should have conformed to the rules of distribution to which it was subject in normal times.

3. IF THE PLAINTIFF IN ERROR IN MAKING DISTRIBUTION OF ITS CARS WAS, BECAUSE OF THE FACT THAT THE CARS SO DISTRIBUTED COULD BE USED BY SHIPPERS IF THEY SO ELECTED FOR INTRASTATE SHIPMENTS, SUBJECT AS TO SUCH DISTRIBUTION TO A DUAL CONTROL, STATE AND FEDERAL, THIS STATE CONTROL WAS EXERCISABLE ONLY AS TO CARS FOR INTRASTATE SHIPMENTS, AND CONSEQUENTLY THE STATE STATUTE REGULATING DISTRIBUTION BY CARRIERS OF THEIR EQUIPMENT COULD HAVE NO APPLICATION TO THE DISTRIBUTION MADE BY THE PLAINTIFF IN ERROR IN SO FAR AS IT HAD TO DO WITH CARS FOR INTERSTATE SHIPMENTS, AND THAT CARS MUST BE REGARDED AS USED FOR INTERSTATE SHIPMENTS WHICH WERE CONSIGNED BY THE SHIPPER RECEIVING THEM TO POINTS OUTSIDE THE STATE IN WHICH THE SHIPMENT ORIGINATED, EVEN THOUGH THE TITLE TO THE LADING PASSED FROM THE SHIPPER TO THE CONSIGNEE OR PURCHASER IN THE OTHER STATE BEFORE THE ACTUAL MOVEMENT OF THE CAR BEGAN.

If we are wrong as to the exclusive operation of Section 3 of the Interstate Commerce Act upon the distribution made of its coal cars by the plaintiff in error, and the enactment of that Section by Congress left the Pennsylvania statute to which we have already referred operative as to the distribution which was made in so far as this had to do with or related to cars for intrastate shipments, the defendant in error has, we submit, recovered in the present action damages in respect to cars which, if received, would have been used for interstate shipments.

That the trial Court intended to exclude cars which would have been used for interstate shipments is clear, for it affirmed the following request of the plaintiff in error for a finding of law:—

> "The plaintiff's right of action in the present case is limited to the loss, if any, resulting from its inability to sell and ship whatever proportion of the additional tonnage it would have mined and shipped had more cars been available to it, which would have constituted its state shipments as distinguished from its interstate shipments."

This request the trial Court answered as follows:—

> "Affirmed, if by the point is meant that no interstate shipments of the plaintiff can be recovered in this action." (Transcript of Record, page 68.)

But that the Court did include such cars, through a mistaken view as to what constituted an interstate use, is equally clear. What this view was is apparent from the following findings by the Court:—

> "That the plaintiff's right to recover in this case by reason of the discriminatory acts of the defendant is not limited by the coal shipped to points within the State of Pennsylvania, but is entitled to recover in addition thereto for whatever coal it can reason-

ably show it could have mined and sold f. o. b. cars at the mines had it not been discriminated against. That coal so sold by the plaintiff company, no matter what its ultimate destination in the hands of its vendees, is commerce within the State for which it has a right of action as between the plaintiff company and the defendant company in the State Courts." (Transcript of Record, page 64.)

"That shipments by plaintiff of its product which were sold f. o. b. cars at the mines upon which the freight was paid by the consignee and destination entirely controlled by the consignees constituted intrastate business and not interstate business as between the plaintiff and defendant." (Transcript of Record, page 65.)

"If by virtue of the undue and unreasonable discrimination practiced in this case the plaintiff suffered damage at the hands of the defendant, it is entitled to recover in this action on the amount of coal it could have sold and would have been able to ship delivered f. o. b. cars at mine, but for the said discrimination of the defendant." (Transcript of Record, page 65.)

Upon the theory that cars used by defendant in error for shipments to points outside the State of Pennsylvania were not used for interstate shipments if the title to the coal loaded therein passed at the mine, the trial Court found that about 88 per cent. of the cars which it had determined the defendant in error should have, but had not, received, would have been put to an intrastate use. This appears from the table opposite page 41 of the Transcript of Record which embodies the trial Court's findings as to the total loss which defendant in error sustained and as the proportion referable to what is designated in the table as "Pennsylvania delivery."

The total loss in this table is put at $58,509.27, and the "Total loss Pennsylvania delivery" at $51,257.85, which is a little under 88 per cent. of the total loss.

This apportionment of the loss is based upon and is in accordance with the following finding of the trial Court:—

> "That the business of the plaintiff was of such a character it did sell of its output from 73% to 96% delivered on board cars at its mines within the State of Pennsylvania, and that it could have sold and would have sold of the output it was entitled to load a like percentage on board cars at mines within the State of Pennsylvania." (Transcript of Record, page 49).

If the cars which would have been used by the defendant in error for shipments to points outside the State would in a legal sense have been put to an interstate use, despite the terms of sale of the coal loaded therein, then as clearly established by the trial Court's findings and by the testimony adduced upon behalf of the defendant in error but 18 per cent. instead of 88 per cent. of the cars not received would have been used for intrastate purposes or shipments.

This is established by the following findings and testimony in the case:

The trial Court affirmed the following request presented by the plaintiff in error:—

> "The plaintiff in the case of coal sold by it to purchasers f. o. b. cars at the mines consigned the coal so sold to the purchaser at the point at which the latter desired delivery thereof to be made. Of the plaintiff's total tonnage shipped in cars delivered to it by the defendant 88,808 tons were shipped in cars consigned to points within the State of Pennsylvania, and 407,413 tons to points without the State of Pennsylvania. The total tonnage so shipped and the division thereof as between points of consignment within and without the State of Pennsylvania was as follows:" (And then follows a table showing monthly the division of the shipments as between those billed to points in and those billed to points outside Pennsylvania). (Transcript of Record, page 57.)

That the additional coal which would have been shipped had additional cars been available would have been shipped to points in and without the State of Pennsylvania in the same proportions as the coal that was actually shipped was established by the evidence of the manager of the defendant in error, George E. Scott, who on this point testified as follows:—

"By MR. COLE:

"Q. Mr. Scott, have you had prepared under your direction and supervision a statement of the amount of coal that was billed during the period of this action strictly to Pennsylvania points and that that was billed by direction of the consignee to points outside of the State of Pennsylvania?

"A. Yes, sir, I have.

"Q. You have?

"A. Yes, sir, I have.

"We offer it now."

"(Marked plaintiff's exhibit No. 27.)

* * * * * * * *

"Q. I show you plaintiff's exhibit No. 27, and I ask you if that is the statement?

"A. That is the statement.

"Q. Now, Mr. Scott, was the market conditions such during the period covered by this action that if you had been permitted to mine the coal that you claimed the right to mine in this case that you could have disposed of said coal to Pennsylvania points of destination and outside points in substantially the same ratio that you disposed of the coal that you did mine?

"A. Yes, sir."

* * * * * * *

"By MR. GOWEN:

"Q. * * * On what do you base your statement that any additional tonnage which you would have mined and shipped would have divided in the same way as between tonnage billed outside the State and tonnage billed within?

"A. I believe I could have sold it in practically the same proportions.

"Q. Is that your judgment or opinion?

"A. It is my judgment as to conditions.

"Q. Of how that tonnage would be divided?

"A. Yes, sir."

(Transcript of Record, page 128.)

The exhibit referred to by the witness was similar to the table which was embodied in the finding of the trial Court last above referred to.

It therefore appears that but 18 per cent. of the additional coal would have been shipped to points within the State, while the defendant in error has recovered as to 88 per cent. of such coal.

That the Court fell into manifest error in holding that cars were not used by the defendant in error in interstate commerce or for interstate transportation which were loaded with coal which had been sold to a purchaser outside the State of Pennsylvania and which when loaded were consigned by the defendant in error to such purchaser and were then transported by the plaintiff in error to the destination to which consigned, is we submit very clear.

The trial Judge's view or theory on this subject was thus expressed:—

> "The plaintiff in this case does not claim for coal which was under contract to deliver outside of Pennsylvania. It claims only for coal sold f. o. b. cars at the mines, which is the point at which the plaintiff's rights over the coal ceased, and for coal shipped to points within the State. In other words, it was not commerce in the sense in which it is used in the Interstate Commerce Act until it passed into the control of the common carrier. Thereafter it was subject to the control of the consignee absolutely, and if then by his direction it passed beyond the borders of the State it then became the subject of interstate commerce as between said consignee

> and the carrier. The plaintiff's delivery was a Pennsylvania delivery." (Transcript of Record, page 73.)

It will thus be seen that in the opinion of the Court a car on a siding while being loaded with coal which was to be transported to a purchaser thereof in another State should not be regarded as used in interstate commerce until it passed beyond the borders of the State in which it was loaded.

That this view is totally at variance with the views which have controlled this Court in several decisions is in our judgment not a disputable proposition.

That the car while in process of being loaded with coal to be transported outside of the State of Pennsylvania was being used or employed in interstate commerce, is, we submit, a necessary conclusion from these decisions.

In the first place, the coal itself while being loaded into the car had entered into or become a part of interstate commerce by reason of the terms upon which it had been sold.

In Savage *vs.* Jones, 225 U. S., 501, the question involved was whether a certain transaction of sale was to be regarded as interstate in character. The nature of the transaction and the conclusion of the Court as to its character is sufficiently disclosed by the following extract from the opinion of Mr. Justice Hughes:—

> "It clearly appears from the Bill that the Complainant was engaged in dealing with purchasers in another State. His product manufactured in Minnesota was in pursuance of his contracts of sale to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce." (Page 520.)

And that the transportation and all connected with it was interstate in character is clear. As in Texas etc. Railroad Company *vs.* Sabine Tram Company, 227 U. S., 111, the question involved was whether certain shipments of lumber were to be regarded as inter or intrastate in character. It

appeared that the Tram Company was engaged in the manufacture of lumber at Rullif, Texas. It had contracted for the sale of a large amount of lumber to W. A. Powell & Co., the delivery to be made at Sabine, Texas. For the purpose of enabling it to fulfill its contract, the Tram Company shipped lumber to Sabine, consigning it to itself at that point, and it then transferred the bills of lading issued therefor to the purchasers Powell & Co.

The transaction, therefore, both of sale and shipment, so far as the Tram Company was concerned, was wholly an intrastate one. Powell & Co., however, had purchased the lumber intending to ship it abroad from Sabine, which was a Texas port, and the lumber thus shipped by the Tram Company was actually exported.

The Tram Company for the shipment to Sabine was charged rates of freight which were in excess of those which could properly be charged if the shipments were to be regarded as intrastate in character.

This Court held that the carrier was not obliged to charge the rates applicable to intrastate shipments because, to quote from the syllabus:—

> "Merchandise destined for export acquires the character of foreign commerce as soon as actually started for its destination or *delivered to a carrier for transportation.*"

Unquestionably if the question involved in the case to which we have just referred had been whether the cars in which the lumber was being transported were engaged in interstate commerce, the conclusion necessarily would have been that they were, for if the transportation was interstate in character, necessarily the vehicles themselves by means of which the transportation was being conducted, were engaged in interstate commerce.

And yet a far stronger argument could be made in support of the proposition that the cars in the case to which we have referred were engaged in intrastate transportation, than the present case admits of, because in the former the

movement of the car was wholly an intrastate movement, whereas in the present case the movement was admittedly an interstate one.

The view of the law upon which this Court acted in the case last referred to was in accordance with the view which had been adopted in respect to a somewhat similar state of facts in the case of Ohio Railroad Commission *vs.* Worthington, 225 U. S., 101.

In Southern Railway Company *vs.* Reid, 222 U. S., 424, the question involved was whether a statute of a State imposing penalties for failure to receive all freight tendered at a regular station had any application to freight tendered for interstate shipments.

It was contended that the statute was not in conflict with the Interstate Commerce Act because that Act did not undertake to deal with or to regulate carriers in respect to the mere receipt of freight tendered for transportation.

With respect to this contention, however, this Court, speaking by Mr. Justice McKenna, said:—

> "It is evident, therefore, that Congress has taken control of the subject of rate-making and charging. All of the particular details we cannot set forth without extensive quotation from the Act, which it is quite inconvenient to make. The provisions of the Act are directed at the abuses most to be feared, unreasonableness in the rates and discriminations, *including in the latter discriminations in service, in the acceptance and delivery of freight, and in facilities furnished.*"

The case of North Carolina Railroad Company *vs.* Zachary, 231 U. S. Adv. Ops., 1913, page 305, is another illustration of the view which has governed this Court in relation to the matter we are considering. In that case the question involved was whether a certain employee of the railroad company was at the time he sustained an injury which resulted in his death engaged in interstate commerce. He was a locomotive fireman, and the circumstances which in the Court's opinion established that at the time of the in-

jury he was engaged in interstate commerce were thus stated in the opinion of Mr. Justice Pitney:—

> "It is argued that because so far as appears deceased had not previously participated in any movement of interstate freight, and that through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as part of interstate commerce, and the circumstances that the interstate freight cars had not as yet been coupled up is legally insignificant."

It would seem to be a necessary inference or conclusion from the above decision that the engine on or about which the employee had been working was itself employed in interstate commerce at the time the work was being done. And if it was so employed because it was about to move interstate cars, the conclusion would seem to be inevitable that a car while being loaded preparatory to an interstate movement was while being loaded employed in interstate commerce.

The view upon which the trial Court acted really goes to the length of treating the Interstate Commerce Act as inapplicable to cars while on sidings and in process of being loaded with interstate shipments, a proposition which is a rather startling one, in view of the general understanding to the contrary.

Under this view a carrier could to any extent prefer a shipper in the distribution of its cars for interstate shipments without offending against the Interstate Commerce Act provided the shipper, before the cars were actually moved or indeed transported across a State line, took care to part with his interest in the lading. We hardly think that this Court will be prepared to sanction such a view of the law

The trial Judge apparently conceded that if the interest of the shipper in the coal had continued while the car in which it was loaded was being transported to a point out-

side the State of Pennsylvania, that in that event the car would have to be regarded as having been used in interstate commerce or transportation.

But if we were to treat the use made by the shipper of the car as the controlling factor, the car should nevertheless be regarded or treated as having been used in interstate commerce or transportation if its transportation from one State to another is directed by the shipper. If a shipper agrees to sell his coal to a purchaser in another State and to load and consign the car to the destination to which the coal is to be transported, as did the defendant in error, it is difficult to see why the car in which the coal is loaded is not used for interstate transportation not merely at the instance of, but for account of the shipper.

But, in any event, we submit, whether the transportation be treated as for account of the shipper or not, nevertheless the car itself by reason of such transportation becomes a vehicle of interstate commerce, not merely while being moved, but while being loaded preparatory to such movement.

What we are concerned with is whether the transportation service for which the car is used makes it a vehicle of interstate or intrastate transportation, and if a car is placed by a carrier with a shipper with liberty to use it for interstate shipments, and is loaded and consigned by such shipper to a point outside the State, unquestionably, we submit, the car can only properly be regarded as a vehicle of interstate transportation.

It is not of the least significance that the defendant in error in the present case may have used the car merely for the purpose of loading coal therein, although as a matter of fact it did more than this, for it not only loaded the coal, but consigned the car to a point outside the State.

The plaintiff in error did not place cars at the mines of the defendant in error or any other shipper simply for the purpose of having them loaded with coal. They were to be, of course, loaded, but merely as preparatory to the transportation of the coal to some destination, and if this destination were without the State of Pennsylvania,

then we submit that the car from the moment when the loading commenced was employed in interstate commerce and became a vehicle of interstate transportation.

4. IT WAS ESSENTIAL TO A RECOVERY UNDER THE STATUTE OF THE STATE OF PENNSYLVANIA UNDER WHICH THE PRESENT ACTION WAS BROUGHT WHICH PROHIBITED UNJUST DISCRIMINATION IN THE DISTRIBUTION BY A CARRIER OF ITS EQUIPMENT THAT IT SHOULD BE SHOWN THAT UNDER THE DISTRIBUTION MADE BY THE PLAINTIFF IN ERROR THE DEFENDANT IN ERROR HAD NOT SECURED ITS PROPER SHARE OF CARS FOR INTRASTATE USE OR SHIPMENTS.

It was necessary, of course, under the theory upon which the trial Judge appears to have acted, viz., that the questions involved in the present action had to do only with intrastate cars, that the defendant in error should have established that in respect to these cars it had been subjected to unjust discrimination. For, of course, if this were not shown or established, then the Pennsylvania statute had not been violated and consequently no action could be maintained thereunder.

By its Statement of Claim the only discrimination charged by the defendant in error was that resulting from an alleged preferential treatment of and overdelivery of cars to one other shipper, viz., the Berwind-White Coal Mining Company, and the right to recover was rested entirely upon the alleged preferences extended to that Company. And the only testimony introduced by the defendant in error tending to prove that it had been unjustly discriminated against had relation to the number of cars which had been delivered to it and to the Berwind-White Coal Mining Company, respectively.

It appeared, however, that in respect to cars used for intrastate shipments the Berwind-White Coal Mining Company had not been favored, as the testimony established that the defendant in error had received a relatively greater number of cars which had been used for intrastate shipments than had the Berwind-White Company. Accordingly the

following request for a finding of fact presented upon behalf of the plaintiff in error was affirmed by the trial Court.

> "The number of cars delivered to the Berwind-White Coal Mining Company and used by it for its state shipments during the period of the action constituted a smaller percentage of its rating than the cars received by the plaintiff and used by it for its state shipments constituted of its rating." Transcript of Record, page 58.

The trial Court, however, declined to hold that the defendant in error had failed to make out a case entitling it to recover because as the Court found it had been subjected to a discrimination of the following character:—

In order to facilitate its car allotment and distribution the plaintiff in error divided the coal territory tributary to its lines into a number of districts or regions, each district or region comprising a number of mines. The mines of the defendant in error were located in what was known or designated as the "Mountain" region, and those of the Berwind-White Coal Mining Company in the "Scalp Level" region.

The plaintiff in error had kept records of its car distribution which are referred to in the case as its "distribution sheets." These sheets had been put in evidence as they contained the record of the distribution made to the mines of the defendant in error and of the Berwind-White Company, and it appeared therefrom that the aggregate number of cars delivered to the mines in the Scalp Level Region had been relatively greater than those delivered to the mines in the Mountain region.

The sheets did not show whether this was the case as to cars used for instrastate shipments, for the subsequent use made by the operators of the mines of the cars placed thereat was not noted upon or disclosed by the sheets. The sheets did show, however, that taking into consideration both inter and intrastate cars, the Scalp Level Region had had a larger percentage distribution, considering the ratings of the mines than had the Mountain Region, but for all

that appeared on the sheets the excess deliveries to the former region may have been due only to an excess in cars used for interstate shipments. But as the defendant in error was bound to prove, as we understand the theory upon which the trial Judge proceeded, that the Pennsylvania statute had been violated, the burden was upon it to establish that in respect to intrastate cars an undue preference had been accorded to the mines in the Mountain Region and manifestly this burden was not discharged by proof that taking the cars in the aggregate—interstate as well as intrastate—an excessive delivery had been made to the Scalp Level region mines.

And even if the aggregate of the cars could be properly considered in determining whether the Pennsylvania statute had been violated, the preference which the Court deduced was not established, because the Court took the mine ratings as the sole determining factor in arriving at the relative percentage of cars which each region had received, and of course if the operators of some of the mines did not order cars up to their ratings or failed to promptly load those which had been delivered at their mines, the fact that the total cars delivered at these mines constituted a smaller percentage of their ratings than their neighbors secured who ordered up to their ratings and loaded promptly, did not tend to prove that the latter had been unduly preferred.

That the condition to which we have just referred was not merely a possibility, but an actuality is established by the trial Court's findings in this case with respect to the extent to which the defendant in error failed to promptly load the cars which were delivered at its mines.

Among the requests for findings presented upon behalf of the plaintiff in error which was affirmed by the trial Court was this:—

> "The plaintiff kept a daily record of the cars received and loaded by it at each of its mines. This record also showed the number of cars, if any, which at 4.30 P. M. each day, when the mines stopped work were on its mine siding, and were still unloaded and empty. The number of days in each month of the period covered

by the action on which unloaded empty cars were on the plaintiff's mine sidings at 4.30 P. M. and the aggregate number of such cars (counting a steel car as two) in each month were as follows:

Month and Year.	No. 1 Mine.		No. 3 Mine.		No. 5 Mine.	
	No. of days.	No. of cars.	No. of days.	No. of cars.	No. of days.	No. of cars.
1902.						
April	19	231	18	233	..	...
May	24	317	24	262	..	...
June	18	216	22	271	..	...
July	14	123	21	145	..	...
August	18	231	18	154	..	...
September	19	318	16	82	..	...
October	20	329	17	150	..	...
November	14	199	5	32	..	...
December	10	113	9	57	7	40
1903.						
January	13	136	9	32	16	49
February	10	106	18	110	14	89
March	22	285	25	252	25	140
April	25	405	24	373	25	269
May	22	249	25	196	21	63
June	24	448	25	221	26	152
July	25	354	20	133	22	95
August	24	395	..	...	22	170
September	25	439	..	...	20	81
October	24	267	..	...	17	57
November	23	363	..	...	16	61
December	24	444	..	...	18	82
1904.						
January	22	280	..	...	14	61
February	21	299	..	...	17	75
March	23	403	..	...	19	84
April	24	357	..	...	17	105
September	24	343	..	...	24	135
October	25	414	..	...	23	129
November	24	378	..	...	22	120
December	16	202	..	...	10	46
	596	8646	294	2703	395	2103

(Transcript of Record, page 62.)

It thus appeared from the records of the defendant in error that in every month in which its mines were operated—for its No. 3 mine was not operated by it after July, 1903, and it did not commence the operation of its No. 5 mine until December, 1902—it was not merely a frequent occurrence, but we are almost justified in saying a regular occurrence, for the defendant in error to have cars standing on its mine sidings unloaded at the close of each day.

As to its large mine and the one which was operated continuously throughout the period, the above table shows that on 596 days out of a possible 754 (counting 26 days to the month) there were cars standing unloaded at the close of the day's work, and as the aggregate of these cars was 8646, the average number per day was 14. And the showing as to the other mines was relatively about the same.

It thus appears that continuously throughout the period of the action the defendant in error was unable or unwilling to promptly load all the cars delivered to it, and yet this fact was wholly ignored by the trial Court and the rights of the defendant in error were determined upon the theory that it was daily in need of and could have used cars in excess of those delivered to it.

But the significant and controlling fact is that the defendant in error did not make out a case entitling it to recover under the Pennsylvania Statute because it failed to show that it had been discriminated against as to intrastate cars.

5. IN ASCERTAINING THE NUMBER OF THE PLAINTIFF IN ERROR'S CARS WHICH THE DEFENDANT IN ERROR SHOULD HAVE RECEIVED, PRIVATE OR INDIVIDUAL CARS BELONGING TO THE LATTER AND WHICH WERE DELIVERED TO IT BY THE DEFENDANT IN ERROR IN CONNECTION WITH THE DISTRIBUTION MADE OF ITS OWN CARS SHOULD BE TAKEN INTO ACCOUNT.

In preparing the table showing the deliveries made at the mines in the Mountain and Scalp Level Regions, re-

spectively, the trial Judge omitted therefrom all the private or individual cars belonging to the shippers whose mines were located in these regions. As the defendant in error was an owner of such cars, this worked out to its advantage because if cars of this character which had been delivered to it by the plaintiff in error in the period of the action had been taken account of and counted as so many cars delivered to it, the number of the plaintiff in error's cars to which it would be entitled would be correspondingly diminished.

It is one of the accepted rules of car distribution that while the owner of a private car is entitled to its exclusive use, the car must nevertheless be counted as a car delivered to such owner by the carrier in arriving at the number of the carrier's cars which should also be delivered.

This rule has been adopted and enforced uniformly by the Interstate Commerce Commission in all cases coming before it, and among these was one in which the rule was held applicable to the plaintiff in error in this case, Hillsdale Coal and Coke Company *vs.* Pennsylvania Railroad Company, 19 I. C. C. Rep., 356.

The existence of this rule was not denied, but the trial Court refused to be governed by it for three reasons: *First,* Because no objection had been raised upon behalf of the plaintiff in error to the omission of the private cars until after the Court's report and opinion had been filed; *Second,* Because in the Court's opinion the plaintiff in error was estopped from urging or contending that the private cars should be taken into account by the fact that under the system of distribution which was in force during the period of the action, these cars had not been counted as against the shippers receiving them; and *Third,* Because if it was necessary to consider the private cars, it was not possible to determine from the evidence what additional cars the defendant in error should have received and it was doubtful whether the results reached by the Court would be materially varied if the private cars were taken into account and counted.

The answer to the Court's first position is that the plaintiff in error had no opportunity afforded it to object to the omission of the private cars until after the Court's report was filed. Throughout the trial and argument of the case the defendant in error relied solely upon the discrimination which it had alleged in the pleadngs, and consequently all the testimony presented upon its behalf was directed to establishing what deliveries of cars had been made to it and to the Berwind-White Coal Mining Company respectively.

The theory upon which the Court acted was not presented or urged upon behalf of the defendant in error, and as a consequence no opportunity whatever was afforded to the plaintiff in error to even present its views as to the right of the defendant in error to recover because of preference extended to the Scalp Level Region. Nor had it any reason to believe until the trial Court's report and opinion were filed that the Court, if it considered at all the relative deliveries made to the Scalp Level and Mountain Regions, would, with the view of determining whether there had been preferential treatment of the former, and if so, to what extent this had operated to the disadvantage of the defendant in error, excluded from consideration the private or individual cars delivered in the regions and to the defendant in error.

At the first opportunity afforded to it, as the Record shows, the plaintiff in error took exception to the exclusion from the Court's computation or table, of individual cars.

The second reason for ignoring the individual cars was thus stated by the trial Court:—

> "The method by which the Court calculated the damages of the plaintiff left out of consideration the individual cars placed in both the Mountain Division and the Scalp Level Division. This method was adopted by the Court for the reason that individual cars were not charged against owners in making distribution until 1906, as shown by the testimony of Mr. Trump, on pages 200 and 201. This date was long after the period of the action. The defendant company, there-

> fore, as a matter of law and morals, should be bound by the position it made for itself and should be estopped from repudiating the rule it enforced, even if later it is found that such rule was technically wrong. This, for the principle that no suitor may come into Court and assert a principle or maintain a position that would enable it to profit by its own wrong." (Transcript of Record, page 107.)

This, we submit, is a wholly mistaken view of the situation which was really this: The defendant in error averring that a statute of the State of Pennsylvania which in effect required the plaintiff in error to make a proper distribution of its equipment had been disregarded to its injury brought the present action. It was consequently incumbent upon the defendant in error to establish that such a distribution as the statute enjoined had not been made, and that as a consequence it had sustained damage. But clearly in such an action the defendant in error cannot claim that it was entitled to receive any greater number of cars than it would have secured under such a distribution as the statute enjoined, and if, as is admitted, in determining the number which it should have received, its individual cars would have to be taken into account, it would seem necessarily to follow that a determination of the number of cars which it ought to have received which excluded from consideration its private or individual cars would secure to it an advantage which it was the purpose of the statute to prevent.

There is really no question of estoppel involved in the case. The plaintiff in error under a mistaken view as to its duty in the premises failed to take into account in the period of the action and for some years thereafter individual cars which it delivered to shippers, upon the theory that the fact that the shipper had provided himself with cars did not debar him from receiving his full share of the carrier's cars. This theory or view was subsequently determined to be an erroneous one, but it is a clear perversion of the law of estoppel to hold that it results therefrom that in an action brought

against it in which the question to be determined is whether a shipper got his proper share of cars, the plaintiff in error is debarred from insisting that the private cars should be considered in ascertaining this fact.

What has been sanctioned in the present case is substantially this:

A shipper who received in a certain period 7059 individual cars has secured damages upon the theory that it should have received the full proportion of the carrier's equipment which its mine ratings entitled it to without any deduction on account of these 7059 cars. It cannot be denied that if the cars which it claims it should have received had been delivered to it, it would have thereby secured a preference forbidden by the law under which it is claiming to recover because that law required that the 7059 cars should be taken into consideration. Is not such a case one in which the shipper is seeking to take advantage of a wrong committed by the carrier which enured to his benefit, and not one in which the carrier is seeking any advantage which it should be debarred from by any theory of estoppel. If in the case we have just instanced the carrier should not have delivered 7059 cars of its own because it had delivered that number of the shipper's individual cars, upon what possible justifiable theory can it be made to respond in damages to the shipper because it did not deliver that number of its own cars?

The third reason advanced by the trial Court why the computation of the damages made by it should not be disturbed because of the failure to count the private cars was thus stated by it.

> "Manifestly, therefore, the Court could not have made, and cannot now make, from any data in the case an equitable schedule of damages on the theory now for the first time presented in this exception." (Transcript of Record, page 97.)

We do not dispute the statement of the Court that a correct schedule of damages was impossible if the private cars were to be counted and the defendant in error's

rights were to be measured with reference to the distribution made to the Mountain and Scalp Level Regions.

But the fact that the damages could not be correctly determined if the Court was required to ascertain the number of cars to which the defendant in error was properly entitled was hardly a justification for assessing the damages upon some other theory or basis, and one which was not legally permissible or correct.

An effort was made by the trial Court to minimize the importance of the proposition in so far as the region distribution was concerned that individual cars ought not to have been omitted from its computations, and reference was made to the fact that the private cars delivered in the Scalp Level Region exceeded those delivered in the Mountain Region in the period of the action, and that as a consequence the plaintiff in error was not injured by the failure to take these cars into account as against a shipper whose mines were located in the Mountain Region. But while this was true as to the whole period of the action, it was not true as to that portion of the period in which the great bulk of the plaintiff's damages were sustained.

In the first twelve months of the period—and these comprise the periods of high prices due to the anthracite strike—the defendant in error according to the Court's computation sustained damage to the extent of $41,794.80, while in the whole period the damage sustained was $51,-257.85. So that more than four-fifths of the damage accrued in the first twelve months of the period. In this twelve-month period the individual cars placed in the Mountain Region amounted to 23,748, while those placed in the Scalp Level Region amounted to 14,821, an excess in favor of the Mountain Region of almost 9000 cars.

(See table prepared by the Court at pages 38 and 39 of the Transcript of Record.)

Of course, if these 9000 cars were to be taken into account the number of the plaintiff in error's cars which the Court found should have been placed at the mines in the Mountain Region would have been correspondingly diminished.

And when we come to consider the effect upon the number which the defendant in error should have received of the cars which were placed at the mines in the Mountain Region, the omission to count the individual cars again operates to the advantage of the defendant in error, for it received in the period of the action 7059 of these cars (see Eleventh Request of Defendant in Error for Findings of Fact, Transcript of Record, page 47), while the mines as a whole in this region received 67,395 cars (see table, Transcript of Record, pages 38 and 39).

The aggregate rating of the plaintiff's mines and of the region for the period of the action, ascertaining these with reference to the total number of days on which the plaintiff in error made its distribution, were respectively 47,476 cars and 738,814 cars. Transcript of Record, pages 53 and 52. The individual cars, therefore, placed in the region constituted 9.1 per cent. of the mines' ratings. Had the defendant in error received the same percentage of its ratings, it would have received 4320 individual cars. It actually received 7059, or an excess of 2739 as compared with the region distribution, and as a consequence it would not have been entitled to share in any excess cars apportioned to the region until there had been deducted therefrom and apportioned and delivered to the other mines so many of such excess cars as were required to give these mines cars relatively equal in number to the 2739 excess individual cars which had been delivered to the defendant in error. But in determining the number of the additional cars which the Court held ought to have been delivered by the plaintiff in error to the mines in the Mountain Region which would properly have been apportionable to the defendant in error, the excess individual cars which it had received were not taken account of, but were wholly ignored.

If, therefore, the judgment in the present case should be sustained, the defendant in error will not only have secured an award of damages which represents a profit on coal assumed to have been lost, but which to a large extent will ultimately be realized, but will have further secured the benefit resulting from the computation of these damages

upon the theory that the plaintiff in error should have delivered to it cars which because they were in excess of the number which the defendant in error was entitled to receive the plaintiff in error would not have been justified in delivering nor the defendant in error justified in receiving, as both delivery and receipt thereof would have constituted a violation of the Interstate Commerce Acts.

The State Supreme Court affirmed the action of the trial Court in disregarding the private cars for all of the reasons upon which the trial Court relied as a justification for so doing, but a further consideration was adverted to as justifying such refusal, which was thus stated by the Court:—

> "Apart from this (*i. e.*, the feature of estoppel) while proper deference to the Interstate Commerce Commission would require our State Courts to regard the furnishing of private cars as a fair equivalent of the same number of company cars, the fact that such cars were furnished, as the pleadings stood in this case, would be purely a substantive matter of defense. If the fact were as here alleged by the defendant it was its duty to establish them by evidence. It does not appear that in any of the requests for findings the Court was asked to derive from the evidence anything that would support the present contention."

Even if it be true that theoretically the burden was upon the plaintiffs in error, as the Court considered, to establish the fact that the individual cars had been delivered, any failure on its part to do this was of course cured by the trial Court's finding that such cars to the number of 7059 had been delivered to the defendant in error, and that such cars to the number of 67,395 had been delivered at the mines in the Mountain Region.

As to the failure of the plaintiff in error which is referred to by the Court to present a request to the trial Court for a finding in support of the contention that the private cars should be taken into account, we have already referred to the facts which establish, as we believe, that the plaintiff

in error was under no such obligation, due to the consideration that the region distribution upon which the trial Court based its finding of discrimination had not been presented or suggested as the proper basis for the ascertainment and determination of the defendant in error's rights up to the close of the case and its submission to the trial Court.

But even if the plaintiff in error should have presented a request of the character referred to by the Court, its failure to do so could not, we submit, have the effect of securing to the defendant in error damages which it was not justly entitled to. And if it was not justly entitled to all the cars which the trial Court held should have been delivered to it, it was not entitled to damages because of the non-delivery thereof, for the payment of these damages would be as obnoxious to the Interstate Commerce Act as the actual delivery of the cars would have been.

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FILED
NOV 10 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1913. No. 76

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

Puritan Coal Mining Company.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

MEMORANDUM OF ADDITIONAL AUTHORITIES.

The following cases in addition to those cited in the brief of the Plaintiff in Error support the proposition set forth on page 36 of the Brief, that under the Interstate Commerce Act actions cannot be maintained in State Courts to recover damages because of injuries resulting from preference or discrimination forbidden by the Act.

In Mitchell Coal and Coke Company *vs.* Pennsylvania Railroad Company, 230 U. S., 247, the Coal Company sought to recover damages from the Railroad Company upon the theory that certain payments made by the latter to other shippers as allowances for services rendered were un-

lawful and consequently should be regarded and treated as rebates.

In determining whether the action was cognizable by the Federal tribunals alone, this Court, speaking by Mr. Justice Lamar, said:—

> *"The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances was one which, under sections 8 and 9 of the Commerce Act (24 Stat., 382), could only be brought in the District or Circuit Court of the United States."*

In Loomis *vs.* Lehigh Valley Railroad Company, 208 N. Y. 312, the Court of Appeals of New York was required to determine whether an action could be brought in a State Court for the recovery of the cost to which the plaintiff had been subjected in providing grain doors for cars which had been delivered to him by the Railroad Company for shipments from a point within to a point without the State of New York. The Court held that at common law the plaintiff had a cause of action, because the duty of the Railroad Company extended to furnishing cars adapted for the shipments to be made in them, and that in the case of the cars which the plaintiff desired grain doors were necessary, and that the plaintiff was consequently entitled to look to the Railroad Company for reimbursement of the amount expended by him in providing these doors, but the Court further held that inasmuch as the cars were intended and used for interstate shipments, the extent of the Railroad Company's obligation must be measured by the provisions of the Interstate Commerce Act, and that if there had been any failure upon the part of the Railroad Company to conform to the obligations imposed upon it by this Act, jurisdiction to entertain actions based upon such failure was exclusively in the Federal tribunals.

> "If the subject," said Werner, J., delivering the opinion of the Court, is covered by the enactments of Congress, and if the Federal Courts or tribunals are invested with jurisdiction over it, our jurisdiction is at

an end without regard to what it may have been at common law or under our own statutes."

The learned Judge then referred to the provisions of the Interstate Commerce Act, which had a bearing upon the question, particularly Section 9 thereof, and then continued as follows:—

"There are other sections of the statutes which have a bearing, but we have quoted enough to make it clear that the general subject is one of which the Congress of the United States has assumed control. It has enacted a statute giving to any person claiming to have been damaged by any carrier subject to the Act his choice of two tribunals in which his grievance may be considered and decided. He may go in the first instance to the Interstate Commission, or he may sue in the Federal Courts, but he must choose between these two. Congress has not only acted in the premises, but it has prescribed in terms which indicate an intention to exclude all others the tribunals to which the claimant must address himself."

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For Plaintiff in Error.

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STATEMENT OF THE CASE

In 1902, 1903 and 1904, the Puritan Coal Mining Company operated bituminous coal mines on the Martin's Branch of the Mountain Division of the Pennsylvania Railroad, West of Altoona, in the State of Pennsylvania. Its only outlet to market was the Pennsylvania Railroad. During the period covered by the Puritan Company's action, April 1, 1902 to December 31, 1904, the railroad company subdivided its line into divisions and branches. The Pittsburgh Division extended from Pittsburg to Altoona, and its eastern end was known, in railroad circles, as the Mountain Division. The Martin's Branch extended Southwardly from the Mountain Division into the Coal fields of Cambria County. A few miles west of the point of divergence of the Martin's Branch, there diverged from the Mountain Division, Southwardly into the coal fields of Cambria and Somerset Counties, a Division designated as the South Fork and Scalp Level, of equal size, dignity, and rank with the Mountain Division. It had branches extending from

it as did Martin's Branch and others from the Mountain Division. On one of such branches of the South Fork and Scalp Level Division—in railroad parlance termed Scalp—the mines of the Berwind-White Coal Mining Company were located. The Puritan mines and the Berwind mines were of the same general character, took the same general rate, called the Clearfield rate, and were twelve miles apart, airline distance. The Berwind operations were much the larger, comprising about 80 per cent of all the mines on the "Scalp" Division.

To determine the number of coal cars that the mine owners should receive in periods of car shortage, the Pennsylvania Railroad adopted, or ostensibly adopted, a system of rating the coal mines according to the capacity as fixed and determined by it, the railroad company. Each division was made a unit, and the mines on that division were given ratings the aggregate of which made 100 per cent, or the unit. These ratings were not matters of public schedule, nor posted with any commission or regulatory body, and were chiefly for the guidance—and conscience—of the railroad company.

Cars for coal shipment were theoretically furnished the mines through requisitions made by the operators from their mines in Pennsylvania to the offices of the railroad company at Altoona, also in Pennsylvania. Ordinarily in times of car shortage, the determining factor in making car distribution was the mine rating fixed by the railroad company, the measure of duty established by itself.

In the spring of 1902, the coal business of the East was much disturbed by the great Anthracite coal strike. Prices of bituminous coal soared high, and fortunes were made and lost in a day. Many anthracite coal cars were released and turned into the bituminous trade,

thousands of them coming into Pennsylvania, and there should have been good business for all. About the beginning of the strike, in April 1902, the Puritan Coal Mining Company's car supply from the Pennsylvania Railroad began to fall off, and it continued perceptibly to diminish to the end of December, 1904. The coal company constantly called the attention of the railroad company thereto, by letters, telegrams and interviews. At one time, the coal company's manager, accompanied by his counsel, called upon the defendant's Superintendent of Transportation in an endeavor to remedy the situation.

In a general way, plaintiff's officers knew that substantial favors were being shown the Berwind mines, its competitors on the adjoining division. They complained to the railroad company's officers repeatedly and bitterly. In the interview with the Superintendent of Transportation above mentioned, his attention was called to the great wrong being inflicted upon plaintiff by the Berwind favoritism, and he replied that "the Pennsylvania Railroad had made up its mind to take care of Berwind and run all chances of doing it." It was several years, however, before the Puritan Company learned the precise mechanism and devices by which the preferences to Berwind were brought about, as they were revealed in their entirety only after Congressional investigation.

During the period of the action the railroad company, by an elaborate and persistent system of secret telegraphic orders, diverted vast numbers of its coal cars from the Mountain Division to the use of the Berwind-White Coal Mining Company on the adjoining "Scalp" Division. This was accomplished by directions of the management—secretly transmitted as special orders—

commanding the subordinate officers to distribute cars to the Berwind mines to the exclusion of any car supply to its competitors on the Mountain Division, of whom the Puritan Company was one. The orders were of the most peremptory character, continuing until December 1904, and they were carried out to the letter, acts of God alone preventing their execution. They had precedence over everything except orders for coal required for the railroad company's own locomotives.

In addition to this special treatment, amounting to 500 cars a day preference or better, the Pennsylvania Railroad Company, in July 1902, sold to the Berwind-White Coal Mining Company, 1000 steel coal cars out of the railroad company's own equipment. These cars wererun into convenient shops or yards, the name of the railroad company obliterated and that of the coal company substituted.

At the trial, the preferential treatment granted the Berwind-White Coal Mining Company was not disputed nor controverted by the railroad company.

The Puritan Coal Mining Company was a heavy loser by reason of its inability to get the share of the coal cars which the railroad company, on its own rating sheets, said it was entitled to receive. It got only a fractional part of the fraction which the defendant said it should receive. It had coal orders and contracts accepted by it, or tendered to it, for practically its entire output, could not fill its orders already booked, and was compelled to decline others.

When the Puritan Company had definitely and unmistakably within its reach the proof positive of the railroad company's lawlessness, of its brazen, arbitary and defiant preference of Berwind, it began its action which had been delayed for several years pending the

crystallizing of suspicion into certainty. Suit was then brought to recover from the plaintiff in error for damages for the wilful, deliberate wrong of the plaintiff in error, done, not in any effort to obey any rule of law, but in pure defiance of all law.

The plaintiff in the action contended that its damages should be measured by placing it on as favorable a plane as the Berwind mines, and allowing it damages for coal it would have shipped had it so received cars. The Court declined so to hold, and permitted a recovery on the basis of the tonnage plaintiff would have shipped had it received its due proportion of the cars unlawfully diverted to the Berwind mines, estimated on the rating established by the defendant itself for plaintiff's mines. The result is a verdict of $74,323.88 for the plaintiff.

At the trial and in the State Supreme Court, the defendant contended that the entire question was one for the Federal tribunals because, although the acts of discrimination committed were done exclusively within the state of Pennsylvania, the cars affected thereby would have been used indifferently in the inter-state and intra-state service of the carrier. Also on the ground that some of the coal that the plaintiff would have shipped but for the defendant's discrimination would ultimately have gone to points outside of Pennsylvania. These contentions were overruled, the Courts holding that the controlling question of discrimination was independent of and apart from any Federal enactment, and that questions of interstate commerce were incidental or not involved at all.

ARGUMENT

THE CHARACTER OF THE DISCRIMINATION

THE QUESTION INVOLVED IN THIS CASE STRIPPED OF ALL OBSCURITY OR TECHNICAL REFINEMENTS IS SIMPLY THIS:

CAN A CITIZEN OF PENNSYLVANIA RECOVER IN THE COURTS OF PENNSYLVANIA FOR A WILFUL, DELIBERATE AND ADMITTED WRONG, DONE WITHIN THE STATE OF PENNSYLVANIA, IN VIOLATION OF ALL LAW, AND OF THE WRONGDOER'S OWN RULES, FOR WHICH NEITHER JUSTIFICATION NOR EXCUSE IS EVEN PRETENDED, NOTWITHSTANDING THE WRONGDOER ENGAGES IN INTERSTATE COMMERCE ?

As determining the forum of the action it is important at the outset carefully to consider the character and the essential elements of the discrimination lying at the foundation of the suit.

We start with the proposition that common carriers are

"required to carry for all . . employers alike.

. . . can show no favors, nor make any distinctions which will give one employer an advantage over another . . . in the . . . accommodations which may be afforded."

Hutchinson on Carriers (3rd Ed,) Section 512, page 557.

Memphis News Pub. Co. vs. Rwy Co., 63 L. R. A. 150.

and with its corollary that

"Common carriers are bound to carry indifferently . . . all applying have equal right . . to have their freight transported . . . They cannot legally give undue and unjust preferences . . . Having the means of transportation, *they are liable to an action* if they refuse to carry freight or passengers without just ground for such refusal. The very definition of a common carrier excludes the right to grant monopolies or to give *special* or unequal preferences. It implies indifference as to whom they may serve . . . ."

Hutchinson on Carriers (3rd Ed.) Section 512, pp 557-9.

New England Express Co. vs. Main Central R. R. Co. 57 Me. 188.

Express Co. vs. Rwy. Co., 81 Me. 92.

The principle is again expressed in the same work as follows:

". . . . at common law every person under identical conditions had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation upon receiving a reasonable hire. If he refused the offer of such goods *he was liable to an action* unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there

was inherent a rule which excluded a preference of one consignor of goods over another."

Id. Section 520, page 566.

Messenger vs. P. R. R. 7 Vroom, 407.

The particular discrimination charged and proved in the case at bar depends not upon any protection of the Act of 1887 to Regulate Commerce, nor its supplements, nor any phase or feature of that Act defining the term, nor on any of the remedial features nor clauses of that beneficial law; but it belongs to the realm and province of substantive and fundamental law. Its practice was illegal from the very inception of the business of common carrier, and references to the same class of misconduct, in the Federal Act of 1887 and the Pennsylvania Law of 1883, are but declaratory of tortious discrimination as it has been known and recognized time out of mind. The statutory penalties imposed by those two laws, and the refinements of definition therein, making certain omissions and commissions by carriers unlawful, no more change or modify the inherent wrongfulness of tortious discrimination, of malfeasance and misfeasance by carrier, than does the prescribing of penalties for murder by various State enactments, constitute murder a crime. It was always a crime under the common law, and prosecution on a charge therefor lay and still lies independently of all statutory provisions.

That the cause of action in the case pending is tortious and actionable at common law is abundantly shown from the record, both by the *probata* and *allegata*.

The matter complained of is set forth in the Plaintiff's Amended Statement, record page 14, (said statement so amended, under the laws of Pennsylvania,

Barclay vs. Barclay 206 Pa. 307, 311.

being the only one before the Court), substantially as follows:

(a) That the Pennsylvania Railroad Company arbitrarily determined the percentage of coal cars the Puritan Company should receive, as well as the pro rata to be received by all other operators out of the total available.

(b) That having so fixed its measure of duty, it was incumbent upon the railroad company to furnish coal cars to the plaintiff in consonance therewith, granting to it the percentage of cars so determined by it to be the deserts of the plaintiff.

(c) That notwithstanding the premises, the railroad company, although it had the coal cars to comply with its obligation, unlawfully refused to furnish the plaintiff with its pro rata share thereof.

(d) That the railroad company instead of giving the plantiff the cars to which it was entitled on the railroad company's own showing and representations, arbitrarily furnished to the Berwind-White Coal Mining Company 500 coal cars daily before distributing any cars to the plaintiff, thereby depriving plaintiff of the just proportion it would have received except for said arbitrary conduct.

(e) That in addition the railroad company caused to be transferred to the Berwind-White Coal Mining Company 1000 steel coal cars which the railroad company had bought for transportation of bituminous coal, and of which the plaintiff would otherwise have received its pro rata.

(f) That by reason of said acts of the railroad company, the plaintiff lost shipments of coal aggregating 298,482 tons, the profit on which would have been $260,777.96.

The Character of the Discrimination

The record shows that the discrimination practiced was effected chiefly by means of secret telegrams which were dispatched by one railroad official to another, commanding and insisting that the Berwind mines in the Scalp Level region be favored. These telegrams are to be found at pages 158-162 of the record. They begin on June 28, 1903 when Mr. Wallis wired Mr. O'Donnel to give Scalp 500 cars on Monday and Tuesday, and impressed on him the importance of keeping Scalp supplied. This is followed by a telegram under date of July 19, 1902, deprecating the inability of the official to get Scalp supplied with cars up to its necessities, urging a supply there of 500 cars on Monday and Tuesday, and 450 cars per day the balance of the week, and the holding over each night of 100 to 125 steel cars to insure an early start at the mines in the morning.

The orders for these cars to the Scalp Level mines were varied slightly in August and September 1902, the special priviliges sometimes falling as low as 425 cars a day; but on October 3, 1902, the order was re-instated at 500 cars daily, and on October 16, this illuminating message passed from Mr. Wallis to Mr. O'Donnel,

> "Commencing at once, please arrange to see that the mines of the Berwind-White Coal Mining Company at Scalp receive equal to 500 cars daily; counting steel cars as two, *before placing at any other operation in the Scalp Level region or on the Mountain.*" (Transcript of Record, page 159.)

On October 21, 1902, the railroad company ordered further protection to the Berwind mines with instructions for 150 to 200 cars to stand over each night, in addition to its 500 per diem, *"even if you do not place cars on the Mountain for coal."* (Transcript of Record, page 159.)

On the same day the wires were laden with a message from Wallis to O'Donnel that

> *"most positive instructions should be issued and the arrangements carried out, with equal to 500 cars will be at the mines of the Berwind White Coal Mining Compay, Scalp Level region, each and every day, before any attempt is made to supply cars to the operations on the Mountain,* South Fork district or South Fork Railroad." (Transcript of Record, page 160).

On November 22, 1902, the official in charge was ordered to give Berwind all the cars in the territory, cutting the other operations. (Transcript of Record, page 160)

A message of January 10, 1903 shows that the cars for Berwind,—500 daily, were to be moved promptly from *Altoona.* (Transcript of Record, page 160)

Under date of June 14, 1903, one of the higher railroad officers complains bitterly of lack of success in keeping Scalp supplied with cars, and renews instructions

> "to all parties interested that *before placing cars for other operations on the Mountain or on the South Fork Railroad equal to 500 cars must be placed for the Berwind-White Coal Mining Company each and every day."*

And this message, a lengthy one from Mr. Creighton, naively remarks that his various instructions are

> *"Absolutely necessary, in order that the requirements of the Berwind-White Coal Mining Company can be met and the wishes of the management in the East carried out."* (Transcript of Record, page 161.)

And orders of similar tone and tenor passedas late as December 12, 1904.

In his testimony (Transcript of Record, page 163),

Mr. O'Donnel admitted his receipt of the orders, and that (page 164) to the best of his ability he carried them out.

George W. Clark, the car clerk in the General Superintendent's office, admitted in his testimony (Transcript of Record, page 167) that the orders were carried out as far as possible; that if the cars were to be had, distribution was made accordingly; that if the conditions permitted, the special orders were carried out by giving cars to Berwind to the exclusion of everybody else (page 168); that the special orders were filled next after company coal supply (page 169), and finally (page 169) as follows:—

"Q. The company had a system of distributing cars regulated by rules?

A. Yes, sir.

Q. *Did the special orders take precedence of those rules?*

A. *When we had the cars the special orders took precedence, yes, sir.*"

David Steele, Assistant Train Master, testified to the execution of the special orders, (Transcript of Record; pages 173-174) as follows:

"Q. What you mean by special order you may tell me?

A. A special order would be to fill it in preference to other orders, except company coal. You must fill your company coal orders first, that is supply coal for the company.

Q. Even to the deprivation of other companies of part of their regular order that special order would first be filled?

A. You would with one class of cars, system cars. It wouldn't interfere with other cars that weren't system cars or individual cars.

Q. *But with system cars that order took preference before any general distribution was made?*

A. Yes, sir.

Q. Do you have a recollection about these special orders for the Berwind-White Coal Mining Company ?

A. Yes, sir.

Q. You heard these telegrams read here, did you ?

A. Yes, sir.

Q. State if the orders included in those telegrams were carried out ?

A. As far as practicable. There may have been some days we didn't have the number of cars to carry them out too. Our sheets will show that.

Q. Did you carry them out to the extent of what cars you had for that purpose ?

A. Yes, unless we met with something that was unavoidable."

To the same effect is the testimony of George W. Creighton, General Superintendent of the Eastern Pennsylvania Division, (Transcript of Record, page 175.)

"Q. Now what was the method and practice that you followed as to the setting apart of cars in order to fill these special orders and what was the effect upon the general distribution of the cars set apart and delivered under these special orders ?

A. The custom was first to provide for the company coal shipments. They were taken out of the sum total of the cars that were available. Second, *we provided for the special orders, and after that was done the balance of the cars were prorated in accordance with the custom at the time into the different fields and collieries.*"

The admissions at the trial of the cause were in keeping with those of Superintendent of Transporation Trump in an interview with George E. Scott and John

Scott, Jr., in 1903. (See testimony of George E. Scott, Transcript of Record, pages 135-136, as follows):

"Q. Did you have an interview with Mr. Trump, in the presence of Mr. John Scott, Jr., about car supply of the Puritan and Berwind mines?

A. I did.

Q. When was that?

A. That was about somewhere in the spring, I think of 1903.

Q. Where?

A. In Broad Street Station.

Q. At his office?

A. In his office.

Q. What was the conversation between you?

A. Soon after we went in the office some word of the day was spoken, and Mr. Trump said, 'Gentlemen, there is no use of your bringing up the question of the Berwind business, because *we are determined to protect the Berwind business at all hazards.*' . . . . . then the remark was made by my brother that it was a remarkable thing for an official of the Pennsylvania Railroad to make such a statement, and he said *they knew the hazards they were taking and they were prepared to meet them.*"

John Scott, Jr.'s, version of the same interview is given in his testimony (Transcript of Record, page 155), as follows:

"I asked my brother George to go with me. I was acting as attorney for the Puritan Company, in which capacity I had written Mr. Prevost, and of course wished him as general manager of the Puritan Company to go there. We went to Mr. Trump's office and was shown into his

room in the Broad Street Station, and he informed us very curtly that it didn't make any difference what we or anybody else might think about the distribution of coal cars on the mountain, that *the Pennsylvania Railroad had made up its mind to take care of Berwind and run all chances of doing it.* I expressed my surprise that a general officer of the Pennsylvania Railroad should make any such statement, and he said that didn't make any difference, that that was their position and he wanted us to know it."

It is very significant that although Mr. Trump was in Court at the trial of the cause, and was on the witness stand (Transcript of Record, page 170), he attempted no denial whatsoever of these charges.

Another feature of special discrimination in favor of Berwind, the transfer to the latter of 1000 steel cars out of the railroad's own equipment, is disclosed in extenso in the testimony of E. B. Chase, (Transcript of Record, pages 152-154). The contract in regard thereto is shown by the correspondence between the Third Vice-President of the railroad company and the Secretary of the Berwind company. The following (page 154), is the witness' story of the physical manner in which the transfer was effected.

"Q. Were they delivered as soon as they were free from the service they were then in, if they were loaded and so on ?

A. We have no means to tell, only we know these cars had been marked with the name of the Pennsylvania Railroad on them, and as they were delivered at their shops where that marking was to be taken off and our marking put on, as the cars were marked they were

turned over to us, and I have a statement here showing how many of the cars were received from time to time."

The testimony of George E. Scott (Transcript of Record, pages 131 to 149) is replete with facts showing the desperate efforts he made to remedy the situation, the pleas he put forth to the railroad company by letter, telegram and personal insistence. It appears (page 136) that in the period of the action he went to the offices of the railroad company 20 to 30 times a year to make complaint about the car supply accorded the Puriton Coal Mining Company, and requests by correspondence for relief, and for cars to fulfill contract obligations (Transcript of Record pages 140-147) were repeated and directly to the point.

This abstract of the facts we contend conclusively establishes that the discrimination the foundation of the action in trespass, is of that general character, that wrongful, malevolent and tortious character, requiring no Act of the Legislature nor of the Congress to brand it as unlawful. It is inherently and fundamentally unlawful, involving moral turpitude, and as actionable without particular legislation to make it so, as rifling a freight depot of the Pennsylvania Railroad by brakeman and conductor of an interstate freight train would be, or as the smashing of a consignment of eggs in an inexcusable freight wreck would be. None of these wrongful acts requires any enabling legislation to support a suit at law to obtain redress for the injury sustained.

E PRINCIPLES OF THE LARABEE MILLS CASE RULE THE ONE AT BAR

As clearly shown by Mr. Justice Stewart in the ion of the Supreme Court of Pennsylvania, this case led by

Missouri Pacific Ry. Co. vs. Larabee Mills, 211 U. S. 612;

that case was defined by Mr. Justice McKenna in later one of

Southern Ry Co. vs Reed, 222 U. S. 424,

ave involved the enforcement

"in the State Court (of) the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce."

By substituting for the words *"equal local switching ice"* in the opinion of Mr. Justice McKenna, the ds *"equal local car supply"* we have the case at bar ced to its lowest terms; and quoting the language

of the Supreme Court of Pennsylvania (Transcript of Record, page 119) comparing the Larabee Mills case with the Puritan case, wherein Mr. Justice Stewart says "*The two cases on principle cannot be distinguished, and we but follow the plain guidance of that case in holding that the power of the State with respect to the subject matter of the present controversy remains undisturbed,*" we respectfully submit the parallel is complete.

In the Larabee Flour Mills case some of the precise contentions made in the case instant were raised. It was argued that discriminations between shippers were cognizable only in a Federal jurisdiction where the cars about which the controversy turned were largely to be devoted to shipments in interstate commerce; but this Court in differentiating the facts distinctly said (Opinion, page 624)

> "*While here is presented, as heretofore indicated, the question of the power of the State to prevent discrimination between shippers . . .* "

and the power of the State was upheld.

It follows as an inevitable conclusion that if a state Court has the power to prevent discrimination by an interstate carrier, it can entertain an action for damages resulting from such discrimination.

In the concurring opinion of Mr. Justice Holmes in that case the jurisdiction of the State Court to prevent discrimination was sustained "on the ground that the cars had not yet been appropriated to interstate commerce, and so were subject to State control." In the case at bar the State jurisdiction is established *a fortiori*, as the ultimate destination of the cars had no bearing whatever on the contentions of the parties; the damage sustained by the plaintiff arising from its absolute failure to receive cars.

Ruled by Larabee Case

That the Larabee Flour Mills case is regarded as highest authority, is shown in the famous Minnesota Rate Case,

Simpson vs Shepard, 230 U. S. 410, where it is approvingly cited a number of times in the opinion of the Court. We respectfully submit that it continues to be law of the land.

Such a construction as we contend for is logical in the light of the principle announced by Mr. Justice Hughes in Simpson vs Shepard, supra, as follows:

> "Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope *without unnecessary loss of local efficiency.*"

And is supported by the rule that

> "Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits."

Chicago M. & St. P. Rwy Co. vs. Solan, 169 U. S. 133-137.

Penna R. Co. vs Hughes, 191 U. S. 477, 491.

Martin vs P. & L. E. R. Co., 203 U. S. 284, 294.

Southern P. Rwy Co. vs Schuyler, 227 U. S., 601, 613.

Simpson vs Shepard, supra.

The case at bar is also ruled by

Galveston, D. & S. A. Rwy Co. vs Wallace 223 U. S. 481, wherein an action was brought for damages caused by the failure of a connecting carrier in an interstate shipment to deliver the goods to the consignee, for which failure the initial carrier is made liable by the Carmack amendment of June 29, 1906, to the Inter-

state Commerce Act of February 4, 1887. The actions were in a County Court of Texas, and the jurisdiction of the State tribunal was attacked, first, on the ground that Section 9 of the Act of 1887 provided that persons damaged by a violation of the statute should resort to the Commission or a United States District or Circuit Court for redress, and that such jurisdiction was exclusive.

This Court held that the causes of action for which damages were sought were not traceable to the Act to Regulate Commerce, and that the suit was maintainable in the State Court, citing

> Atlantic Coast Line R. Co. vs Riverside Mills, 219 U. S. 208.

By the same token we contend that the cause of action that lies at the root of the Puritan Coal Mining Company's case, although recognized by the Interstate Commerce Act, is not dependent upon it, and that the facts that make the case were actionable at law long before anybody dreamed of the Interstate Commerce Act.

This Honorable Court went much further in the Wallace case, supra, than it is required to go here, and announced that

> "it is now recognized that the jurisdiction of State Courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought."

It also laid down the following rule:

> "*But jurisdiction is not defeated by implication. And considering the relation between the Federal and State government, there is no presumption that Congress intended to prevent State Courts from exercising the general jurisdiction already posseseed by them.*

> "On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a State Court as well as in those of the United States. This presumption would be strengthened as to a statute like this, passed not only for the purpose of giving a right, but of affording a convenient remedy."

To hold with the plaintiff in error on the jurisdictional question, would make the Interstate Commerce Act, instead of a helpful and well contrived piece of legislation, one of the most monstrous engines of injustice ever devised. Time and again carriers commit minor and petty acts of discrimination, of the same kind but in lesser degree than those disclosed in the case at bar. A farmer has his crop ready for shipment and for days at a time the local freight passes by and gives the cars, there being a general shortage, to a neighbor the crew regards more highly. An orchardist has his apple crop ready for shipment and the car distributor out of pure perverseness fails to give him shipping facilities and the fruit rots. Those in charge of the shipping facilities of a carrier have relatives they wish to favor. They give them cars for shipment of their produce when the market is high, and compel a neighboring competitor to take his facilities when the market has gone down. All these, and many more cases that might be cited, occur much oftener than the uninitiated think. Each instance involves a comparatively few dollars.

If the rule insisted upon by the Pennsylvania Railroad Company is the law it works an absolute denial of justice to the poorer classes, and extends an invitation

to carriers to engage in tortious discrimination of the petty kind ad lib. It is only the more powerful that can resort to the Federal tribunals for redress of substantive wrongs the remedy for which is by actions of trespass. The distance to travel, the expense of litigation, the loss of time, are too great; and the humbler sufferers from petty discriminations involving turpitude will have to submit to scandalous conduct on the part of carriers, and let their wrongs go unredressed unless the State forums, their home Courts, are open to them.

Surely, it never was intended to make the "Act to Regulate Commerce" such an engine of injustice by compelling the citizens of the States to bring damage suits for violations of fundamental law by carriers, in the Federal tribunals, when their wrongs can be equally well, and with far greater facility redressed at home.

THE LEGAL PROPOSITIONS OF PLAINTIFF IN ERROR AS GROUPED INTO FIVE ISSUES ARE BASED UPON ASSUMED, NOT PROVEN, FACTS

If a party is permitted to make his facts he usually has no trouble with the law, and it is only by stating facts and conclusions that defendant in error claims to be unwarranted by the record that the plaintiff in error is enabled to invoke the law that it does.

Discrimination there surely was,— proven, — admitted,—and found by the court, and it is not now controverted by the plaintiff in error. We wish to refer briefly to the five issues, so called, stated in the brief of argument of plaintiff in error.

1. The first issue assumes the very fact in controversy, and without that assumption it has nothing upon which to stand. It is a bald, glittering generality.

2. Without the assumption thus made in the first issue, the second must fail because it depends alone upon that assumption.

3. The third issue is based upon an entirely erroneous view of the facts in the case and, consequently, untenable conclusions are drawn.

The question is not the disposition made of cars distributed by the plaintiff in error, for the cars about which we complain were never distributed. It is a proven, admitted fact and also a fact found by the trial court that the cars were not ordered for Interstate Commerce, and that no designation as such was made when the orders were given. The cars were ordered for the loading of coal by the defendant in error to be either shipped or sold in the State of Pennsylvania. On the fact of the orders alone the railroad company had no justification for assuming that any of the cars were to enter into Interstate Commerce, and in fact none of them did so enter because they were not delivered.

The plaintiff in error did not refuse to deliver them because of any rule or regulation either statutory or of its own, relating to Interstate Commerce, either allowing or justifying such refusal.

If suit had been brought in the Federal Courts the plaintiff in error might as well have contended that the cars were subject only to the rules of Intrastate Commerce, and that it would not be answerable for its wrong in that tribunal.

4. The fourth issue, if it be an issue, was found as a fact in favor of the defendant in error, by the eighth finding of fact by the trial court on page 34, transcript of record.

5. The fifth issue is raised by the seventh assignment of error. The disposition made of this assignment by the Supreme Court of Pennsylvania, ought to be conclusive; we quote from page 122 transcript of record from opinion of supreme Court:

"In making its distribution of its own cars, exclusive of those owned by private parties, the defendant company was observing not only its own practice but that which had up to that time been prevailing. However, general the practice, it was, as held in the case referred to, in plain violation of the Interstate Commerce Act. In making the present objection the defendant company would set up its own disregard and violation of the law in mitigation. It had its own purpose to serve in excluding private cars from the computation. Whatever the purpose was, the scheme was acquiesced in by all the shippers in the district, as fair and equitable, with full knowledge of all facts, since so far as appears, none made complaint. Now that it has been made to appear that the defendant company disregarded its own basis of distribution, not because it was inequitable for the reason that the private cars had not been included in the computation, but solely with a view of giving a particular shipper an unlawful preference, it seeks to mitigate the consequences of its own dereliction by having applied a rule it defied when it established the basis of distribution upon which all acted throughout the entire transaction. Apart from this, while proper deference to the Interstate Commerce Commission would require our State Courts to regard the furnishing of private cars as fair equivalent of the same number of company cars, the fact that such cars were furnished, as the pleadings stood in this case, would be purely a substantive matter of defence. If the facts were as here alleged by the defendant, it was its duty to establish them by evidence. It does not appear that in any one of the requests for findings the court was asked to derive from the evidence anything that would support the present contention. The point was not raised or even distantly referred to in the course of the trial but was indicated first in an exception to the court's conclusion. We accept the learned judge's reasons for dismissing the exception as

entirely sufficient. He says, among other things with respect to the matter:"

This was purely an afterthought on behalf of the plaintiff in error, and it would be against all equity and justice to permit it now to set up its own wilful violation of law to release itself from an unpleasant position that it purposely assumed as we say, with thoroughly bad intention.

Before proceeding with the general argument we wish further to direct the special attention of the court to the fact that this suit was not brought by the defendant in error in the court below upon the Pennsylvania Statute, and that it does not depend upon that statute alone for its validity.

The action as stated in plaintiff's statement of claim, page 15 transcript of record, was based as follows:

> "That under the *constitution*, and Laws of this Commonwealth *as well as at common law* the defendant company as a common carrier organized etc."

The plaintiff in error has persistently argued that the action is founded alone on the Pennsylvania Statute. This is denied, and contradicted by the Record.

While the plaintiff in error has been astute to discover that the remedy invoked by the defendant in error, according to the former's views, is not the proper one, it has never yet suggested to any court what the proper remedy is, or where it lies; while admitting its wrong it has contended with equal vigor before the Interstate Commerce Commission, the Federal Courts, and the State Court that neither of them was the competent tribunal to redress the wrong.

With this preliminary statement we proceed further to discuss the law.

THE SUIT IN WHICH RECOVERY WAS HAD IS MAINTAINABLE AT COMMON LAW GENERALY, AS WELL AS BY VIRTUE OF THE PROVISO OF SECTION 22 OF THE INTERSTATE COMMERCE ACT

In grouping its legal propositions, as well as elsewhere in its brief, the plaintiff in error contends, reiterates and reesserts that the action of the Puritan Coal Mining Company was and is under and by virtue of the Statute of the State of Pennsylvania, prohibiting unjust discriminations. The pleadings do not so show, as we have already pointed out. On the contrary, they aver a common law cause of action and are drawn under common law forms. It is true that the cause of action asserted is actionable as well under Pennsylvania Statute as at common law, of which the Statute is declaratory; but we respectfully submit that it is an unwarranted and gratuitous assumption of the plaintiff in error to suppose that the action of trespass under consideration has its sole being in the statutory law of

Pennsylvania. The offense is one at common law as well as by statute as set forth in the opinion of the State Supreme Court.

The contention of the defendant in error is that right of action is preserved

(a) by the genius of our laws which saves common law actions unless there is some express reason to the contrary, and

(b) by the proviso to Section 22 of the Interstate Commerce Act itself.

(a)

The Interstate Commerce Act is not to be construed so as to abridge or take away the common law right of the carrier to make contracts further than its terms and recognized purposes require.

Interstate Commerce Commission vs. L. etc. R. Co., 73 Fed. 409.

C. etc. R. Co., vs. Osborne, 52 Fed. 914.

An action against an interstate carrier for damages in affording other shippers better facilities, though *an action lies for the same cause at commoa law*, is *also* an action arising under the Interstate Commerce Act, and is removable from the State to the Federal Courts, when the petition for removal sets up defenses based on the Act.

Lowry vs. C. B. & Q. Ry. Co., 46 Fed., 83.

In discussing the question the Court in the case last cited stated:

> "It is said in argument that the suit cannot certainly be said to arise under the Act of Congress because the complaint states a good cause of action at common law. It must be conceded that the complaint would be good at common law. And it is true that the provisions of the Interstate Commerce Act prohibiting unjust

and unreasonable charges and unjust discrimination are merely declaratory of the common law. (2 Red. R. R., 95; Hutch. Carr., 243, 302). And the remedies afforded by the Act of Congress for such practices are cumulative, and not exclusive of the remedies existing at common law. (Sec. 22 of the Act here quoted)

The law would have been the same independently of this provision.

The rule is that when a statute gives a remedy in the affirmative (without a negative express or implied) for a matter which was actionable at common law, this does not take away the common law remedy, but the party may still sue at common law as well as upon the statute."

Potter, Dwarris St., 275, note 5.

The continued existence of the common law rights of the shipper is recognized and announced in

Tift vs. Southern Rwy. Co., 123 Fed. 789, 791.

where the effect of the Interstate Commerce Act is considered in the following language:

"It (Congress) thus created no new rights in the shipper, but, by embodying his right by the common law in a law of the United States, Congress enabled him, in case of controversy, to apply for relief to a Court having jurisdiction of controversies arising under the constitution and laws of the United States. . . . . The Act was drawn with the broad purpose to facilitate interstate commerce and to restrict the arbritary exercise of power by common carriers.

It afforded special remedies for this purpose, but these appear to us to have been intended to supplement, and not to supplant, the remedies which the citizens already enjoyed."

Suit Maintainable Under Common Law

This Honorable Court has decided that the matters complained of by the defendant in error, the Puritan Coal Mining Company, for which it brought its suit were common law causes of action by holding that

> "It is *settled* that *at common law* a common carrier *must carry for all to the extent of his capacity*, without unjust or unreasonable discrimination either *in* charges or *facilities* for actual transportation."
>
> Atchison, etc., Ry. Co. vs. Denver, etc., Ry. Co., 110 U. S. 667.
>
> I. C. C. vs. Cincinnati, etc., Ry. Co., 167 U. S. 479.

The same thought is expressed in slightly different form by other eminent authority, as follows:—

> "The exclusiveness of the jurisdiction over suits brought under these remedial sections of the Act (Interstate Commerce Act) to enforce its provisions *must be distinguished from the concurrent jurisdiction of the State Court* over questions in interstate commerce, not arising from or based upon the Act."
>
> Judson on Interstate Commerce, Sec. 325, page 418, 2nd Ed.
>
> Murray vs. R. R. Co., 62. Fed. 24.

The converse of the proposition is equally true, that:

An interstate carrier can exercise all its rights under the common law to the full extent unless made unlawful by the Interstate Commerce Act.

> McElvain vs. St Louis, etc., Ry. Co. (Mo. 1910) 131 S. W., 736.

The general rules of statutory construction bring us to the same goal. Thus, it is asserted that

Suit Maintainable Under Common Law

"It would seem that an act, which, without altering the nature of the offence, as by making it felony instead of misdemeanor, imposes a new course of procedure for that *which was already an offence, at least at common law*, is usually regarded as cumulative, and as not superseding the pre-existing law."

Endlich on Interpretation of Statutes, Sec. 237, page 315.

King vs. Pomeroy, 121 Fed, 287, 292.

Mitchell vs. Duncan, 7 Fla. 13.

State vs. Wilson, 43 N. H. 415.

U. S. vs. Spohrer, 175 Fed. 440, 447.

Macoluso's Naturalization, 237 Pa. 132,137,

"Statutes are not presumed to make any alteration in the common law further, or otherwise, than the Act does expressly declare."

Endlich on Interpretation of Statutes, Sec. 127, page 173.

Arthur vs. Bokenham, 11 Mod. 150.

" If the duty to which the new procedure applies, already existed before the Act, the offence is usually subject to the common law procedure and punishment, as well as to the special procedure so given."

Endlich on Interpretation of Statutes, Sec. 467, page 665.

A remedial statute is to be liberally construed with reference to the purpose of its enactments.

Farmers and M. Nat. Bank vs. Dearing. 91, U. S. 29.

Bechtel vs. U. S., 101 U. S. 597.

Smithmeyer vs. U. S., 147 U. S. 358.

Stewart vs. Bloom, 11 Wall. 493.

Galveston, etc., R. Co. vs. Cowdrey, 11 Wall. 459.

Johnson vs. Southern P. Co., 196 U. S. 17.

Suit Maintainable Under Common Law

"No statute is to be construed as altering the common law further than its words import,"

Shaw vs. Merchants' Nat. Bank of St. Louis, 101 U. S. 557,

Brown vs. Barry, 3 Dall., 365.

Legislative intention must be expressed with irresistible clearness if a Court of Justice is to suppose a design to overthrow fundamental rights.

U. S. vs. Fisher, 2 Cranch., 358.

Davey vs. Ruffel, 14 Pa. C. C., 277.

Courts in construing statutes follow the rule that where a particular construction will occasion great inconvenience, that view is to be avoided, if another and more reasonable interpretation is present in the statute.

Knowlton vs. Moore, 178 U. S., 41.

Bate Refrigerating Co., vs. Sulzberger, 157 U. S. 37.

(b)

The proviso to Section 22 of the Interstate Commerce Act reads:

" . . . Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

We respectfully urge and contend that independently of the general principles already presented, the right of action of the Puritan Coal Mining Company for discrimination such as existed to its great prejudice, was expressly preserved in the State Courts by said Section 22.

This section has been construed several times by this tribunal, and we submit that the case in hand meets the tests prescribed by the Court.

Suit Maintainable Under Common Law

For instance, in

Texas and P. R. Co., vs Abilene Cotton Co., 204 U. S., 426, 447,

the Court said:

> "The clause is concerned alone with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act."

That case was one brought in a State Court and involved a question of unreasonableness of rates, which this court said must first be determined by the Interstate Commerce Commission, the right and the remedy asserted in the State Court being *repugnant* to the provisions of the Act to regulate Commerce, the Court declining to consider the jurisdiction of the State Court if the right asserted had been in harmony with the provisions of that Act.

We contend here that the right asserted by the defendant in error is recognized by the Act to Regulate Commerce, and that the right to sue for damages in the Federal Court therein expressly given is cumulative to the common-law action therefor for damages in the State Court. It inevitably follows that the plaintiff below was in a court having jurisdiction.

As throwing light upon the subject, and indicating the real purpose of the "Act to Regulate Commerce," demonstrating its broad scope, its comprehensiveness and its purpose to be a real remedy, we quote from the Report of the Committee on Interstate Commerce to be found in Part I; Senate Reports, First Session, 48th

Congress, 1885-86, Volume 2, a means of interpretation approved by this Court as an aid to determining the scope of statutes, in

Binns vs U. S., 194 U. S., 486.

Church of Holy Trinity, vs U. S., 143 U. S., 457.

Northern P. R. Co. vs. Washington, 222 U. S. 370,

and recognized as late as

Simpson vs Shepard, supra.

in the opinion of the Court.

An excerpt from the concluding paragraphs of the Report of that Committee, on page 215, reads thus:—

"The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places and commodities, or particular description of traffic. *The underlying purpose and aim of the measure is the prevention of these discriminations*, both by declaring them unlawful and *adding to the remedies now available for securing redress and enforcing punishment*, and also by requiring the greatest practical degree of publicity as to rates, financial operations and methods of management of the carriers."

As an aid to the interpretation of this proviso, we

resort to the history of the period and of the Act to Regulate Commerce, as it wended its way through the National Legislative Halls, a means of interpretation sanctioned by this Court to the length of inquiring into the Congressional debates.

Guarantee Ins., Trust and S. D. Co., vs. Sellers, 122 U. S., 276.

Texas & P. R. Co., vs. I. C. C., 162 U. S. 197.

Standard Oil Co. vs. U. S., 221 U. S., 1.

The following facts are brought to the fore:

(1) The House of Representatives was violently opposed to the Commission plan, and favored the Reagan Bill.

(2) The Senate supported the Cullom Bill, of which the Commission clause and the long—and short—haul clause were dominating features.

(3) The more radical members of the House insisted upon a provision in the Bill declaring violations of the Act cognizable in the State Courts, and making actions therein brought irremovable to the Federal tribunals. (Just such a provision has been added to the Employers' Liability Act of April 22, 1908, by the Amendment thereto of April 5, 1910).

(4) The proposed measure, on the disagreeing votes of the two Houses was sent to a Conference Committee, whose report was made through Senators S. M. Cullom and Isham G. Harris, Managers on the part of the Senate, and Representatives John H. Reagan, Charles F. Crisp and A. J. Weaver, Managers, on the part of the House.

The House conferees, in their statement, required by Rule XXIX, say:

"The House conferees on the disagreeing votes between the two Houses on the bill of the Senate "to regulate commerce", and the bill of the House "to regulate commerce among the States, and prevent unjust discrimination by common carriers", make the following detailed statement of the changes between the House bill and the substitute herewith appended.

"The action of the House being to adopt a single amendment, your committee, without attempting to call attention to the precise changes made in each section of the bill, report to the House the substance and effect or the changes made as follows:

* * * * * * * *

"Section 22 of the substitute bill, among other things, provides that nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but that the provisions of this act are in addition to such remedies, with a proviso that no pending litigation shall in any way be affected by this act.

J. H. REAGAN,
CHARLES F. CRISP,
A. J. WEAVER,
Managers on the part of the House.

This will be found in Volume 18, part 1, pages 697 and 698, Congressional Record, 49th Congress, 2nd session.

An examination of the debate in that session of the 49th Congress shows almost conclusively that the proviso of Sec. 22 of the Act was adopted in response to a very stirring demand that existing rights of litigants in State Courts should be preserved, notwithstanding the creation

of new rights and new remedies by the proposed new law; and that without such a concession the Interstate Commerce Act in all likelihood would not have been passed. It demonstrates almost with mathematical certainty that said proviso was a compromise between the warring elements: those who, on the one hand, wanted all the matters comprehended in the proposed Act to Regulate Commerce justiciable before the State Courts and not removable at the instance of the carrier, and those who, on the other hand, inclined to exclusive jurisdiction in the Federal tribunals.

The right of the plaintiff to recover is not given alone by the Act of Congress of Feb. 4th, 1887. It is *recognized* as a right by the first paragraph of the third section of the Act. That paragraph, however, is but declaratory of the Common Law existing at the time, for the violation of which redress might be sought in either the State or Federal Courts according as the Courts might have jurisdiction of the parties. In this respect the Act gave no new right to the plaintiff, and if the Interstate Commerce Act had never been passed, the plaintiff's right was ample and its remedy secure. The Common Law was enforceable and enforced alike by the Courts of the United States and of the States where it obtained. Adams Express Company vs. Croninger, 226 U. S., 491, (page 504 of report.)

The right to recover under the Common Law as it then existed was co-extensive and identical with the redress given by the Act of 1887, to wit:—a right to compensation for all damages suffered. No new measure of relief is sought.

Suit Maintainable Under Common Law

If then, the proviso to the 22nd Section of said Act preserving then existing remedies is to be given any force whatever, this action must be saved, by the very terms of the proviso. Such, we submit is the import of this Court's ruling in Texas & Pacific Railroad Company vs. Abilene Cotton Oil Company, 204 U. S., 426, and Adams Express Company vs. Croninger, 226 U. S., 491.

It must be conceded that in no event is this a case for the Interstate Commerce Commission, but is purely a matter redressible before some Court. Without an express declaration to that effect, the Act of Congress would not take away a remedy then existing for the violation of a then existing right. It is only where a *new right* is created by a statute and a remedy given for the enforcement of the right in the same statute that the remedy thus given is exclusive.

In the case at bar.

"the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal."

Tennessee Coal, I. & R. Co. vs. George, 233 U. S., 354.

THE ACTION IS MAINTAINABLE REGARDED AS A SUIT UNDER THE STATUTE OF 1883 OF THE STATE OF PENNSYLVANIA

We believe, and assert with the utmost confidence, that this action is equally proper and equally maintainable if it be regarded as a suit under the law of 1883 of Pennsylvania, which is merely declaratory of the common law. And we argue the point, *not* because the action is brought solely by virtue of said Act—it being a common-law action—but because the plaintiff in error chooses so to regard it, for its own purposes, at all times carefully avoiding the common-law feature.

A moment's glance at the text of the Act of 1883 satisfies that it but serves to make that a prohibited matter which already was prohibited without special enactment; to proscribe by the written law those very things which were already proscribed by the unwritten or common law.

The *rule* of compensation for the wrong inflicted is the same as at common law and as under the Federal statute of 1887, *damages for the injury sustained.* True, a higher *quantum* of damages *may* be recovered, but that feature plays no part here, as the only recovery sought was for the same mathematical *quantum* as obtains at common law and by Federal statute, and that is all that has been awarded.

We, therefore, contend that the kind of flagrant, reprehensible and inexcusable discrimination practiced in favor of Berwind to the prejudice of the Puritan Company is actionable by virtue of the principle that

> "Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits."
>
> Chicago, M. & St. P. Ry. Co. vs. Solan, 169 U. S., 133, 137.
>
> Penna. R. R. Co. vs. Hughes, 191 U. S., 477, 491.
>
> Martin vs. P. & L. E. R. Co., 203 U. S., 284, 294.
>
> Missouri P. R. Co. vs. Larabee Flour Mills Co., 211, U. S., 612.
>
> Southern P. Rwy. Co. vs. Schuyler, 227 U. S., 601, 613.
>
> Mo. Pac. R. Co. vs. Kansas, 216 U. S., 262.
>
> Simpson vs Shepard, 230 U. S., 410.

The propriety of the action under the Pennsylvania statute is also manifest from the principle announced in the following language:

> "The legislation of states, safeguarding life and property and providing comfort and convenience within its jurisdiction, may extend *incidentally* to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands."
>
> Wisconsin, etc., R. Co. vs. Jacobson, 179 U. S., 287.
>
> Richmond, etc., R. Co. vs. Patterson Tobacco Co., 169 U. S., 311.
>
> Western Union Tel. Co. vs. James, 162, U. S., 650.

Atlantic C. L. R. Co. vs. No. Car. Comm'n., 206 U. S., 1.

Louisville & N. R. Co. vs. Kentucky, 161 U. S., 677.

Northern P. R. Co. vs. No. Dakota, 216 U. S. 579.

Smith vs. Alabama, 124 U. S., 465.

Hennington vs. Georgia, 163 U. S., 299.

Chicago, M. & St. P. Ry. Co. vs Iowa (No. 176 Oct. Term 1913 Op. April 13, 1914.)

The propriety of the action regarded as one under the State law is further vindicated by the following excerpt:

> "There are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce."

Western Union Tel. Co. vs. Commercial Mill Co., 218 U. S., 406.

Louisville and N. R. Co., vs. Kentucky, 183 U. S., 503, 518,

and still further vindicated in the light of the doctrine of Western Union Tel. Co. vs. James, 162 U. S., 650, 660, stated in the following language:

> "The statute in question is of a nature that is *in aid of the performance of a duty of the company that would exist in the absence of any such statute*, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence *is not an addition to the duty which it would owe in the absence of such statute. Can*

> *it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or obstruction to interstate commerce*, within the meaning of that clause of the Federal Constitution under discussion? We think not."

The contention of the plaintiff in error that the state law is inapplicable because there was but one distribution of coal cars by the plaintiff in error, that is, it made but one allotment from its offices in Altoona to the mines, regardless whether the cars were to go to an ultimate destination within or whithout the state, after loading, is effectually disposed of by the language of Mr. Justice Hughes, in the Minnesota Rate Case, as follows:—

> "The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right of way, terminals, bridges and stations are provided for both classes of traffic . . . . .; that terminals, *facilities* and connections in one state aid the carrier's entire business . . ."
>
> "But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce."
>
> Simpson vs. Shepard, 230 U. S., 410.

Moreover, the attempted construction of the Pennsylvania Statute of 1883 by the plaintiff in error is entirely too narrow and illiberal. That statute should be read in the light of the law as it existed, with a view to construing it so that it may have some force and effect.

So considered, it is obvious that its whole purpose was to regulate the local duty of a common carrier within the State of Pennsylvania. In enforcing that duty it undertook to say that no railroad company should unduly or unreasonably discriminate between individuals, or individuals and corporations, in furnishing facilities for the transportation of freight, whether said freight was destined to points within or without the State. What it was treating of was *the local duty of the railroad company to furnish facilities.* The fact that at the close ef the second section the subject of transportation of freight is not referred to as "coming from or going to any other state" is strong evidence that the purpose of the Act is to compel furnishing facilities as a local duty at the time and place required by an intending shipper, regardless of the destination of the freight.

The use of the words "within this state or coming from or going to any other state is hereby declared to be unlawful" at the end of the first section is not intended to define the character of transportation facilities to be furnished. These words merely indicate the comprehensiveness of the purpose of the Legislature to enjoin further commission of a very common unlawful practice; the lawmakers meaning thereby to say, and certainly saying, that no carrier should set up as an excuse for violation of its local duty to furnish facilities without discrimination, that the purposes for which the facilities were intended were either interstate or intrastate.

The test of the persons who come within the protection of the Act is not the *place* to which the facilities would eventually be transported, when loaded, but the individual, firm or corporation recognized by the carrier as entitled to transportation facilities. And it is matter of common knowledge in the coal business, as borne out

by the record in this case, that facilities for transportation, are not furnished at the instance of the buyer of the coal, but on requisition of the seller, that is, at the instance of the mine, the entire transaction and service being purely local. Otherwise coal business could not be conducted at all, for a host of coal buyers would demand facilities without knowledge of the needs, capacity equipment and working conditions at the mines with which they did business, and coal mining would come to a standstill.

Between the *buyer* of coal f. o. b. cars at the mine and the carrier, the intricacies and distinctions that arise in differentiating interstate and intrastate traffic undoubtedly may become important, but they have no place, we submit, in the question here under consideration, a purely local matter in the final analysis thereof.

CASES OF PLAINTIFF IN ERROR ANALYZED AND DIFFERENTIATED

The many cases relied upon by the plaintiff in error to support its contentions have the greatest weight and are of the highest authority when taken in their proper connection; but no mere statement of undisputed general principles as to the line of demarcation between State and Federal authority can avail. It is not contended that the *general propositions of law* are anything different than is laid down and pointed out at great length by the plaintiff in error.

It is vigorously disputed, however, that the principles invoked have any application to the case in hand, or that the generous excerpts from the leading cases cited control the issues at bar. It is highly important to analyze the facts to which the principles were made to apply. Once that is done it is so clear as almost to be transparent, that the cases relied upon by the railroad company are not parallel to the one in hand, in fact or in legal principle deducible therefrom. Without exception, they relate to matters of rate or to regulation of strictly interstate commerce, and not to civil and transitory actions based upon violation of fundamental law.

Northern Pac. Ry. Co. vs. Pac. Coast Lbr. Mfrs.' Ass'n., et al., 165 Fed Rep., 1, was a case whose avow-

ed purpose was "to compel compliance with the provisions of the interstate commerce Act." (page 9)

Sheldon vs. Wabash R. Co., et al., 105 Fed. Rep., 785, is placed squarely on the ground that "the interstate commerce Act *creates* rights and remedies *not* existing at common law: that the jurisdiction of the federal courts over causes *arising under* the interstate commerce Act is exclusive; and that a State court has no jurisdiction to enforce rights given *solely* by the interstate commerce law."

In Van Patten vs. Chicago, M. & St. P. R. Co., 74 Fed. Rep., 981, the action *"is expressly based upon the provisions of the interstate commerce Act,"* and is for recovery of damages "for alleged violations of the interstate commerce Act."

These three cases are cited by plaintiff in error as much on the question of procedure as anything else.

Southern Railway Co. vs. Reed, 222 U. S. 424, involves a question not only of *regulation* but of *conflict of regulation*, pure and simple. By a state regulation, a carrier was bound to receive freight for transportation from North Carolina to West Virginia under a heavy penalty for refusal.

No rate had been filed, established or published with the Interstate Commerce Commission, between the two points, and for fear of suffering the punishment prescribed by the Act of 1887, the freight agent refused to issue a bill of lading to one who tendered freight for shipment between the two points.

In a suit brought against the carrier for the penalty prescribed by the state law, this Court in reviewing the judgment against the carrier, said that the regulation enacted by the Interstate Commerce Law was paramount, for otherwise

"If the carrier obey the state law, he incurs the penalties of the Federal law: if he obey the Federal law, he incurs the penalties of the State law," (page 442).

Chicago, R. I. & P. R. Co. vs Hardwick Farmers' Elevator Co., 226 U. S., 426, deals solely and exclusively with a statute prescribing definite and fixed *time regulations* for delivery of cars. The suit was brought for the statutory penalty for delays made after requisition filed for cars to be used *in interstate traffic.*

This again was a *matter of regulation* and nothing else, the prescribing of a rule of conduct for car delivery by a state tribunal, when Congress had entrusted the promulgation of such rules to an administrative body of superior authority.

Moreover, the Hardwick case does not rule the one in hand for another reason besides the difference in the principles involved. It rests upon the provisions and amendments of the Hepburn Act of 1906, whereas the matters complained of in the case instant were of a period that terminated two years earlier than that act.

Yazoo & Miss. Valley R. R. Co. vs. Greenwood Grocery Co., 227 U, S., 1. points out very succinctly that the principle of the Hardwick Farmers' Elevator Co. case applies only to matters subsequent to June 29, 1906.

The decision however is rested upon a different principle entirely, that a penalty exacted for delays in delivering cars at the termination of interstate transportation was inflexible and absolute, permitting no defense by way of excuse or justification ; and that it there

fore "constituted an unreasonable burden upon interstate commerce."

No such principle remotely bears upon the case in hand.

Railroad Commission vs. Worthington, 225 U. S., 101, deals solely witn the question of the establishment of a *rate* by a State commission that constituted "an attempt to regulate interstate commerce."

The famous case of Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S., 452, deals solely and exclusively with car distribution *rules and regulations.* It has no application to isolated cases of tortious discrimination or preference as between two neighboring, competitive shippers.

Northern Pac. Ry. Co. vs. Washington, 222 U. S., 370, is utterly inapposite. It shows conflict between State and Federal *hours of service regulations for interstate railway employees,* an attempt by the state to regulate the subject through a law post-dating an Act of Congress, covering precisely the same subject. Moreover, the enforcement of the local law was directed against employees of a train, at the very time engaged in interstate commerce.

THE INTENDED DESTINATION OF COAL FOR WHICH DEFENDANT IN ERROR FAILED TO GET TRANSPORTATION FACILITIES IS BUT AN INCIDENTAL AND COLLATERAL QUESTION IN THE CASE.

(a)

The plaintiff in error makes much of the proposition that recovery of damages was permitted for loss on coal that eventually would have gone to points outside of Pennsylvania had it been shipped. Our contention is that Justice Stewart of the State Supreme Court decided rightly when he said that the intended cestination of the coal was not a question in the case.

The service, failure in which eventuated in this litigation, was a purely local matter between the railroad offices and yards in Altoona and the mines, a few miles distant. Cars were requisitioned by the coal operator, not for shipment to any particular point, but for use in loading coal at the mines. The subsequent question of shipment after loading was one that did not enter into the consideration of either party, and is entirely remote from the subject of inquiry in the case.

Intended Destinations a Collateral Question

Having proved the delinquency of the plaintiff in error, the discrimination flagrant, unblushing and unexplained, the fact that the railroad company had violated law, that the coal company had tried ineffectually to stop the iniquity, only to be laughed at in the Broad Street offices of the railroad, having proved that its business had gone to ruin and its trade been annihilated by reason of these very things, it became incumbent upon the defendant in error to show to what extent it had been harmed, and in what sum it had been damaged.

So to do, it resorted to the very rule which, inferentially at least, has been laid down as the correct one in

Pennsylvania Railroad Co. vs. Internat'l. Coal M. Co., 230 U. S., 184.

It showed what it had lost in a financial way through the railroad company's torts. It showed orders on its own books that had been cancelled because deliveries were impossible, offers of business that it had to turn away because cars were denied it, inquiries for coal to which it had to turn a deaf ear because its cars were going to a competitor while it stood idle; in short, it showed in a detailed, comprehensive, and impressive manner, just what loss it sustained from a dollar and cents standpoint, meeting in every respect the test laid down by this Court, and rising to every requirement of the law wherever it has been settled on this point.

It was in the elucidation of this branch of the case, the liquidation of damages, that testimony was introduced as to prospective destinations of coal that defendant in error would have shipped but for the railroad company's wrongdoing. It was purely an incidental matter, however, having no bearing upon the main issue,

and its only purpose and function was to sustain and reinforce the credibility of the witnesses who appeared on that branch of the case. Manifestly, it would hardly do for a suitor, complaining that he had lost thousands of tons of coal business, to decline to go into detail, to refuse to tell who his customers were and where his coal would have been consumed. It was in the development of these details, and not otherwise, that the question arose, out of which plaintiff in error seeks to make so much, and which defendant in error relying upon the Larabee Flour Mills case in 211 U. S., 612 and cases cognote in principle, regards as purely collateral.

There is no rule in force in any jurisdiction known to defendant in error that requires "the amount of injury suffered" to be divided or subdivided according to the doctrine that the railroad company invokes. The question of interstate and intrastate shipments as it develops when inquiring into the *consequences* of the railroad company's conduct, we contend, is not in the case.

The jurisdictional test, we respectfully submit, has no application beyond the *person* or the *cause of action*. Once it is determined that the particular forum has cognizance of the cause of action, the jurisdictional test ends, and the Court that entertains the action has the right to consider damages and all damages proximately resulting from that cause.

If the converse of the proposition be true, and the contention of the plaintiff in error be correct, a recovery for personal injuries sustained by an employee of the Pennsylvania Railroad Company, engaged in purely intrastate service at the time of his injury, on suit brought in the state court, would be limited in its scope according as the future earnings of the employee might be derived from services on trains devoted to state ship-

ments, or to interstate shipments; and if the railroad company proved that ninety per cent. of the future trips of the injured man would have been to Trenton, New Jersey, only one-tenth of his loss could be recovered in a suit brought in Pennsylvania.

We do not believe that any one will seriously argue that this is the law; but it is precisely in line with the effort of the plaintiff in error to make the Puritan Company's measure of recovery dependent upon ultimate destination of the coal it would have mined and shipped had it been fairly treated.

On the contrary, it assuredly must be the law that any Court which has jurisdiction to entertain the action can consider and pass upon all the consequences that flow from the wrong inflicted; that they are all a proper subject of recovery in such forum; that such Court has the right to consider all damages proximately resulting from the particular cause.

(b)

Assuming, however, that we might be mistaken in the main proposition advanced, and that possibly destination of intended shipments might have some bearing on the case, we contend that the rule invoked in the trial court, approved by that court but said to be outside the case by the State Supreme Court, makes an affirmance of the judgment necessary.

Our contention is that as the entire recovery was on the basis of coal that defendant in error would have sold f. o. b. cars at the mines in the interior of Pennsylvania, its relation to the coal ended in Pennsylvania and the judgment as a whole should stand. Care was taken to exclude from the recovery any damages the

Puritan Company would have sustained on coal *it* would have delivered outside Pennsylvania, had it received cars.

In other words, we say that, as between plaintiff in error and defendant in error, the question of the state or interstate character of the intended shipments is determined by the point of delivery of the coal, *by the place where the defendant in error's relation to the coal terminated*, irrespective of the fact that for some one else the plaintiff in error, had it furnished the cars, would have carried the coal to a more distant point, whether within or without Pennsylvania.

The uncontradicted testimony of the plaintiff showed that 72 per cent. to 97 per cent. of the coal it was prevented from shipping, was intended for delivery to the purchaser f. o. b. cars at the mines. That such contract constituted a termination of plaintiff's relation to the coal, and that all questions thereafter as to its actual carriage resolved themselves into questions of respective rights and duties between the railroad company and the *buyer* of the coal, are sustained by abundant authority.

Diehl vs. McCormick, 143 Pa., 584.

Dannemiller vs. Kirkpatrick, 201 Pa., 218.

Dentzel vs. Island Park Ass'n., 229 Pa., 403.

Wright vs. B. & O. R. R. Co., 32 Pa. Superior Ct., 5, 12.

Mull vs. P. R. R., 38 Pa. Superior Ct., 416.

Goods cease to be governed by the domestic and begin to be governed by the national law of commercial regulation *at the moment in which they commence movement for transportation from the state of their origin to that of their destination.*

Brown vs Houston, 114 U. S. 622.

Coe vs Errol, 116 U. S. 517.

P. & S. Coal Co. vs Bates, 156 U. S. 577.

Kelley vs. Rhoads, 188 U. S. 1.

Diamond Match Co. vs. Ontanagon, 188 U. S., 82.

Gulf, C. & H. R. Co. vs. Texas, 204 U. S., 403.

U. S. vs. Del. & H. Co., 213 U. S., 266.

Southern P. Terminal Co. vs. I. C. C., 219 U. S., 498.

That is to say, *upon the delivery in the cars but not until then*, has the coal destined for some point outside the borders of Pennsylvania become a subject of interstate transportation, and it then assumes that character, *not between seller and railroad company, but between railroad company and vendee.*

Mr. Justice McKenna, in Southern Pacific Terminal Co. vs. I. C. C., supra, at page 527, says "goods are in interstate, and necessarily as well in foreign commerce when they have *actually started* in the course of transportation to another state or been delivered to a carrier for transportation." It logically follows that until they have been actually started in the course of transportation to another state, they are not in interstate commerce; and that, therefore, in the case at bar, no question of interstate commerce or transportation can arise, because the relation of the coal company to the coal would have terminated entirely immediately prior to its becoming an article of interstate transportation.

The absence of any question of interstate commerce or interstate transportation in this case is emphasized when attention is directed to the thought that the controversy relates, not to commerce *in esse*, but to commerce *in posse*; the *coal* was in existence, and the

opportunity to dispose of it was at hand, but the *commerce* in it, by reason of the conduct of the plaintiff in error, was but potential.

(c)

Assuming for the sake of argument, and nothing more, that we might be wrong as to the proposition (b) just advanced, if there is anything in the record to justify a finding that any portion of our claim related to purely intrastate business, that particular portion must be recoverable in this case. A certain proportion of the claim of the plaintiff below related admittedly to purely intrastate business. That fact appears by answer to the plaintiff inerror's own request (13th request, pages 57 and 58, Transcript of Record).

If, then, this Court should be of opinion that coal that defendant would have sold f. o. b. cars at mines would constitute interstate commerce, where by purchasers' directions it would have been consigned outside the state, the coal it would have sold for delivery within the borders of Pennsylvania would necessarily be a subject that should be considered and litigated in this case and in the Pennsylvania courts. In such event, we respectfully submit, should our main propositions fail, this Court should grant a new trial to the end that damages for that branch of the cause of action might be liquidated in the State Court.

THE USE TO WHICH THE FAVORED OPERATOR PUT ITS EXCESS CARS IS IMMATERIAL.

At various places in the course of its argument, the plaintiff in error advances the proposition that a recovery is limited to a comparison of the cars that defendant in error actually loaded that the consignee destined for Pennsylvania points of delivery and those that the Berwind-White Coal Mining Company loaded for similar delivery; and that if it were shown that the Berwind Company actually sent fewer cars to Pennsylvania points than did the Puritan Company, the latter was out of Court. One entire section of the brief of plaintiff in error, pages 51 to 54 inclusive, is devoted to this remarkable proposition.

Nothing, we submit, could more clearly show the fallacy and the unreason of the proposition, that the destinations of the intended shipments which became impossible to make because of failure in the Puritan Company's car supply, have any part in this case. Merely to state the proposition seems to constitute refutation thereof. In its simplest terms, the plaintiff in error says, true it is that we gave Berwind many cars more than their share (it so says in its tenth request for find-

ing of fact, Transcript of Record, page 55), but that should make no difference to you because they used the illegally granted facilities to do business outside of Pennsylvania, therefore you are not harmed. We repeat here what we said in the State Supreme Court, that it would be a surprising and novel doctrine in jurisprudence to hold that the damages sustained by the injured party were dependent upon the uses to which the advantaged party put the vehicles of favoritism that he had showered upon him by the carrier. Unless the ordinary rules of law have been revolutionized, we feel confident that the Supreme Court of the United States will not limit the recovery of a litigant in a damage suit of this kind by the manner in which the favored competitor disposed of the fruits of the discrimination.

The unreason of the proposition becomes more palpable than ever by turning to the record again, and glancing over the telegrams on pages 158 to 162, and observing that the favoritism was largely extended for the purpose of enabling the Berwind company to coal steamers and steamships in New York Harbor, a class of business which those acquainted at all with economic conditions at the time know constituted the very cream of the market and commanded the very topmost prices.

And the rashness becomes even more pronounced, as does the brazen character of the discrimination, by a close scrutiny of the telegram from R. M. Patterson to G. W. Creighton, under date of December 8, 1904 (Transcript of Record, page 162), reading as follows :

> "We are falling behind on *our* steamship contracts in New York, and the Berwind-White people have got to unload on Sunday. Under these circumstances please arrange to give

them a full supply of cars to-morrow and Sunday. This is to be understood as a special order."

The entire scheme there stands revealed; the entire plot is unfolded in the unguarded use of the short pronoun "our." It indicates a partnership arrangement between persons high in the councils of the plaintiff in error and the favored coal operator, in the very delectable and profitable business of coaling steamships.

Can it be possible in the face of such revelations that the defendant in error will be restricted in its recovery because, forsooth, the coal operator who profited by the unlawful conduct of the plaintiff in error derived most of its gains from New York Harbor business?

We respectfully submit that the judgment should be affirmed.

A. M. LIVERIGHT,
A. L. COLE,
for Defendant in Error.

PENNSYLVANIA RAILROAD COMPANY *v.* PURITAN COAL MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 76. Argued November 11, 1914.—Decided April 5, 1915.

Section 8 of the Act to Regulate Commerce gives the shipper a right of action against the carrier for damages occasioned by his doing an act prohibited by the statute, and § 9 gives the shipper the option to proceed either before the Interstate Commerce Commission or in the Federal courts.

Construing §§ 8 and 22, however, in connection with the statute as a whole, the Act to Regulate Commerce is both declaratory and creative, and while shippers are given new rights, existing causes of action are preserved and the jurisdiction of state courts is not superseded, in cases in which the decision does not involve the determination of matters calling for the exercise of administrative power and discretion of the Commission or relate to subjects over which exclusive jurisdiction is given to the Federal courts.

While the Federal courts may have exclusive jurisdiction of a suit brought to declare that a rule of practice promulgated by the carrier is unfair, a suit for damages occasioned by the violation or discriminatory enforcement of the carrier's rule, fair on its face and not attacked as unfair, does not involve administrative questions but only those of fact; and even though for damages arising in interstate commerce, such a suit is not within the exclusive jurisdiction of the Federal courts, but may be prosecuted either in those courts or in the state courts.

The state courts have jurisdiction of an action of the shipper against the carrier to furnish a reasonable number of cars, whether the action be treated as one for breach of the common law duty to furnish the cars or for unjust discrimination in allotting cars to another shipper in violation of the carrier's own rule to furnish all the shippers on an equal *pro rata* basis. The jurisdiction of the state court is not defeated because the breach of common law duty is also an unjust discrimination.

Motive for breach of common law duty of the carrier to furnish a reasonable number of cars is immaterial, and what was a proper supply under the circumstances is a matter of fact.

While, ordinarily, a shipper on reasonable demand is entitled to all the cars it can promptly load, that right is not absolute, and a carrier is not liable for failure to supply cars as the result of sudden and great demands which it had no reason to apprehend, but in a case of car shortage it is bound to treat shippers fairly if not identically.

Where there is a shortage and the shipper complains that the carrier's rule of distribution is unfair, the question is for the Commission, *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 312, but where the shipper does not attack the rule itself but complains that the carrier refused to furnish the number of cars it was entitled to under the rule, while other shippers were furnished more cars than they were entitled to under the same rule, a preliminary finding of the Commission is unnecessary; and even if the shipments were interstate the state and Federal courts have jurisdiction.

An exception is properly disallowed by the state appellate court, and will be disregarded by this court, if no relevant testimony was offered to support it and no point thereon raised in the trial court.

237 Pa. St. 420, affirmed.

In March 1908, the Puritan Coal Mining Company brought suit in the Court of Common Pleas of Clearfield County, Pennsylvania, against the Pennsylvania Railroad Company for damages caused by the latter's failure to furnish cars needed for the transportation of coal. On November 21, 1908, the plaintiff filed a "Statement of Claim" in which it was alleged that the defendant was a common carrier of freight between points within the State of Pennsylvania and as such bound to furnish shippers with adequate facilities for the transportation of coal, but that the carrier did not, as required by law, furnish the plaintiff with sufficient cars to enable it to transport coal mined by it. By reason of such failure to perform its duty and legal obligation, the defendant caused the plaintiff damage to the extent of $260,777.

Other paragraphs in the Statement alleged that the carrier established and published the capacity of all coal mines in the region reached by its railway; that, as a common carrier, it was bound to furnish cars upon the

basis of equality in proportion to the rated capacity of plaintiff's mines. But, disregarding its duty, under the statute of the State, the defendant did, unreasonably as well as unlawfully, refuse to furnish the plaintiff with its pro rata share of coal cars held for daily distribution and did subject the plaintiff to unreasonable disadvantage in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Company by giving to the latter 500 cars before distributing any to the plaintiff. By reason of the undue and unjust discrimination against the plaintiff and the undue preference in favor of the Berwind-White Company the plaintiff was not furnished with the cars to which it was entitled and thereby lost the profit of $260,777 which it could and would have made on coal, which it could and would have shipped had it received its due proportion of cars.

On November 23, 1908 and again in April 1911, other Statements were filed which repeated and amplified the charge of unjust discrimination in the distribution of cars whereby the plaintiff received less and the Berwind-White Company more than was proper under the rule of allotment, established by the carrier.

The defendant moved to dismiss the case because the state court was without jurisdiction. The court held that the motion was bad as a demurrer; bad as a plea in abatement, and dismissed it as having been prematurely made. The defendant filed no other defense except a plea of the Statute of Limitations as to certain items of damage claimed in an amendment to the original Statement.

By consent the case was heard by the judge without a jury. He made a report of the facts from which it appears that: Ordinarily the carrier was able to furnish shippers with cars on demand; but in 1902 there was a strike in the Anthracite Region which cut off the usual supply of anthracite coal to eastern cities and compelled them to use bituminous coal mined along the lines of the Pennsyl-

vania Railway. The new demand for soft coal was so great that the Railroad Company was not able to supply the full number of cars called for by the mining companies on its line. Its established rule in such cases was that cars should be allotted to the several coal Districts in proportion to their output, the cars thus allotted to the Districts being then distributed to the mining companies therein in proportion to their capacity. During the Anthracite Coal Strike, however, the carrier violated this rule and made excessive allotments to the "Scalp Level Region," in which the Berwind mines were located, and made too small an allotment to the "Mountain Region" in which the Puritan mines were situated.

There was evidence that the Puritan Company had orders for coal at a price which would have netted it a large profit. The coal so ordered was to be delivered "Free On Board" the cars at the Puritan mines—the purchaser and consignee paying the freight to points of destination within and without the State. There was evidence that the Puritan Company was ready, willing and able to make such sales and deliveries and constantly demanded cars in order to enable it to fill these orders. Sometimes the carrier for days would fail to furnish cars, with the result that the company's mining operations were seriously interrupted. Sometimes the Puritan got cars but not the full number to which it was entitled on the basis of distribution according to mine capacity, although the Berwind-White Company during the same period received more than its proportion.

The Railroad Company's elaborate and detailed Distribution Sheets were introduced in evidence. They showed the number of cars to be allotted to mines on the basis of capacity for each day of the period during which the car shortage existed. From these Sheets and the other evidence in the case it appeared that the Berwind Company received many more cars than its share and that the

Puritan received several thousand less than its proportion. There was proof as to the number of tons these cars could have hauled; that the Puritan had orders for coal which it would have sold if these cars had been furnished; there was also evidence as to the royalty and cost of production, with data on which to make calculation of the damage resulting from the failure to receive cars.

The trial judge held that the state court had jurisdiction and entered a judgment for the plaintiff, which with interest amounted to $74,323.88. Exceptions to the report were overruled and the case was taken to the Supreme Court of Pennsylvania on assignments in which complaint was made that the trial judge erred—

"(1) in holding that the state court had jurisdiction;

(2) in failing to hold that, under the Commerce Act, the Federal court alone had jurisdiction;

(3) in holding that the business between the Puritan Company and the Railroad was intrastate business where coal was sold F. O. B. the cars at the mines;

(4) in holding that the plaintiff could recover damages for failure to receive cars intended for use in shipping coal outside the State;

(5) in adopting the method for distributing cars on which the damages were collected;

(6) in failing "to take into account the private or individual cars, so-called, which were delivered to the plaintiff during the period of the action in determining the number which it would have been entitled to receive of the additional cars which the court has found should have been allotted to the region or district in which the plaintiff's mines were located."

Mr. Francis I. Gowen, with whom *Mr. Frederic D. McKenney* and *Mr. John G. Johnson* were on the brief, for plaintiff in error:

The Interstate Commerce Act alone is applicable.

Actions for breach of the Interstate Commerce Act are not maintainable in state courts.

Cars while being loaded preparatory to interstate movement are employed in interstate commerce.

If the action is maintainable as to intrastate cars, unjust discrimination in distribution of such must be shown to justify recovery.

In determining the number of cars the shipper is entitled to, his individual or private cars must be counted. *Balt. & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Adams Exp. Co.* v. *New York*, 232 U. S. 14; *Chicago &c. Railway Co.* v. *Hardwick Elevator Co.*, 226 U. S. 426; *Clark Brothers* v. *Penna. R. R.*, 241 Pa. St. 515; *Hillsdale Coal Co.* v. *Penna. R. R.*, 19 I. C. C. 356; *Int. Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Loomis* v. *Lehigh Valley R. R.*, 208 N. Y. 312; *Minnesota Rate Cases*, 230 U. S. 352; *Mo. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *Morrisdale Coal Co.* v. *Penna. R. R.*, 230 U. S. 304; *North Carolina R. R.* v. *Zachary*, 231 U. S. 305; *Nor. Pac. Ry.* v. *Pacific Coast Ass'n*, 165 Fed. Rep. 1; *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *Ohio* v. *Worthington*, 225 U. S. 101; *Pennsylvania R. R.* v. *Int. Comm. Comm.*, 193 Fed. Rep. 81; *Savage* v. *Jones*, 225 U. S. 501; *Sheldon* v. *Wabash Ry.*, 105 Fed. Rep. 785; *Southern Ry.* v. *Reid*, 222 U. S. 424; *Stineman Mining Co.* v. *Pennsylvania R. R.*, 241 Pa. St. 509; *Tex. & Pac. Ry.* v. *Sabine Tram Co.*, 227 U. S. 111; *Thompson* v. *Pennsylvania R. R.*, 10 I. C. C. 640; *Van Patten* v. *Chi., Mil. & St. P. Ry.*, 74 Fed. Rep. 981; *Yazoo & Miss. Valley R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1.

Mr. A. M. Liveright and *Mr. A. L. Cole* for defendant in error.

Mr. Justice Lamar, after making the foregoing statement, delivered the opinion of the court.

The Pennsylvania Railroad Company, an interstate carrier, was sued in a state court for damages caused by its

failure to furnish the Puritan Company with cars in which to load coal for shipment to points within and without the State. The pleadings alleged not only that the carrier had failed to perform its duty to furnish cars, but that in violation of a state statute it had unjustly discriminated against the Puritan Company by failing to distribute cars in accordance with the carrier's own rule that, in time of shortage, they should be allotted to the coal companies on the basis of mine capacity.

The trial court held that the plaintiff was entitled to recover damages caused by the unjust discrimination in distribution of cars. The Supreme Court of Pennsylvania did likewise and affirmed the judgment in favor of the plaintiff. 237 Pa. St. 420.

The Railway Company then brought the case here insisting in effect that (1) the determination of the proper basis for the distribution of cars was a matter calling for the exercise of the power of the Interstate Commerce Commission; (2) that no court had jurisdiction of a suit against it for discriminatory allotment until after the Commission had determined that its rule for distribution was improper; and (3) that no suit for damages against an interstate carrier could be brought for damages occasioned by a failure to deliver cars or for an unjust discrimination in distribution, except in a United States court.

1. These contentions involve a consideration of the jurisdiction of the Commission, of the state courts, and of the Federal courts. But fortunately it will not be necessary to enter into an elaborate discussion of each of the questions.

Section 3 [1] of the Commerce Act makes it unlawful for

[1] "SEC. 3. It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, cor-

the carrier to unduly prefer one shipper over another. Section 8 [1] gives a right of action against the carrier for damages occasioned by his doing an act prohibited by the statute, and § 9 provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." . . .

It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court; and that the Federal tribunals have exclusive jurisdiction of a certain class of cases referred to in § 9 has been recog-

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poration, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[1] "SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

nized in the few decisions dealing with the question. See *Copp* v. *Railroad Co.*, 43 La. Ann. 511; *Carlisle* v. *Missouri Pacific*, 168 Missouri, 656; *Western &c. R. R.* v. *White*, 82 S. E. Rep. 644; *Gulf, C. & S. F. Ry.* v. *Moore*, 98 Texas, 302; *Puritan* v. *Pennsylvania Co.*, 237 Pa. St. 448. In *Mitchell Company* v. *Pennsylvania Railroad*, 230 U. S. 250, the same view of the statute was taken in discussing another, but related, question. This construction is also supported by the legislative history of the statute. For while the Hepburn Act, as a convenience to shippers, permitted suits on Reparation Orders to be brought in the Federal court of the District where the plaintiff resided or the Company had its principal office; and while the act of 1910 (36 Stat. 554) in further aid of shippers, permitted suits on Reparation Orders to be brought in state or Federal courts, it made no change in §§ 8 and 9 which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court.

2. But §§ 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently, for the purpose of preventing such a result, the Proviso to § 22 declared that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

That proviso was added at the end of the statute,—not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to

property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common law duties and the like. But for this proviso to § 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. *Galveston &c. R. R.* v. *Wallace*, 223 U. S. 481.

Construing, therefore, §§ 8, 9 and 22 in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. Compare *Abilene Case*, 204 U. S. 439, 446; *Robinson* v. *Balt. & Ohio*, 222 U. S. 506; 36 Stat. 551 (15); 38 Stat. 220.

In the light of these conclusions, and bearing in mind that the damages sued for here are found to have been inflicted during the anthracite strike of 1902 (before the passage of the Hepburn Act of 1906) it becomes necessary to determine whether the plaintiff's suit was based on a right of action as against an interstate carrier of which the state court had jurisdiction.

3. The difficulty in answering the question grows out of the double character of the pleadings and the construction given the facts by the state court.

The "Statement" contains four counts—one on the common law liability for failure to furnish cars, and the

other three for damages occasioned by unjust discrimination. The plaintiff seems to have ignored his common law cause of action and the trial court entered a judgment for plaintiff for damages as for unjust discrimination. The Supreme Court of Pennsylvania affirmed the judgment, but said that 'if the case was with the plaintiff on its facts, and it is so found there was an offense threefold in character: (1) the offense against the common law, (2) an offense against the Pennsylvania statute of June 3, 1883, making undue and unreasonable discrimination unlawful, (3) an offense against § 3 of the Federal statute regulating interstate commerce.'

There are several decisions, already cited, which hold that suits against Railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in § 9.

But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is

no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal courts.

4. It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated as a suit for a breach of the carrier's common law duty to furnish cars, or an action for damages for the carrier's unjust discrimination in allotting cars to the Berwind-White Company, while at the same time refusing to follow its own rule and furnish them to the Puritan Company on the basis of mine capacity. In either case the liability is the same. For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been, in a sense, a discrimination against B. In those instances neither the cause of action, nor the jurisdiction of the court, is defeated because the breach of duty is also called an unjust discrimination.

In the present case the pleadings contained no reference to the Commerce Act. The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. The plaintiff's right and measure of recovery would have been exactly the same if the cars had been furnished to a Manufacturing Plant, instead of to the Berwind-White Coal Company. The plaintiff's cause of action and damages would have been the same if the failure to receive the cars had been due to the fact that the carriers negligently allowed empty cars to stand on side tracks; or, if by reason of a negligent mistake they had been sent to the wrong point. The motive causing the short supply of cars was therefore wholly immaterial, except as corroboration of other evidence showing an actual shortage of cars, so that, if we ignore the plaintiff's characterization of the defend-

ant's conduct, and consider the nature of the case, alleged in the first count and established by the evidence, it will appear that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common law liability to furnish it with a proper number of cars. What was a proper supply was a matter of fact.

5. Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that "if his coach be full" he was not liable for failing to transport more than he could carry. Hutchinson on Carriers, 146; *Lovett* v. *Hobbs*, 2 Shower, 127; *Riley* v. *Horne*, 2 Bing. 217; *Peet* v. *Ry.*, 20 Wisconsin, 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. The law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not, identically. In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered—whether perishable or staple and whether a necessity of life needed in crowded cities and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true

in *Morrisdale Coal Co.* v. *Pennsylvania Railroad*, 230 U. S. 304, 312–314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory since it took no account of private and foreign cars controlled by the mining company. The reasonableness of the rule was a matter for the Commission.

6. The present suit, however, is not of that nature. It is not based on the ground that the Pennsylvania Railroad's rule to distribute in case of car shortage on the basis of mine capacity, was unfair, unreasonable, discriminatory, or preferential. But, as shown above, the plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled. In support of that issue of fact the plaintiff relied on the carrier's own rule as evidence. That rule, and the carrier's Distribution Sheets, showed the number of cars to which the Plaintiff, the Berwind-White Company and other Coal Companies in the district, were each entitled. The evidence further showed that the plaintiff did not receive that number of cars to which by rule it was thus entitled. So that on the trial there was no administrative question as to the reasonableness of the rule but only a claim for damages occasioned by its violation in failing to furnish cars. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 197. The state and Federal courts had concurrent jurisdiction of such claim against an interstate carrier without a preliminary finding by the Commission.

7. It is, however, argued that such a question, calling for the exercise of the administrative function of the Commission, did in fact arise out of the defendant's claim and contention that the court should have taken private cars into account in determining whether the plaintiff received the number to which it was entitled. But, probably because of the carrier's own rule of distribution, there was

no pleading raising such an issue, and there was no sufficient evidence as to the number of private cars received by the Puritan, the Berwind-White, or other companies. The information on that subject was peculiarly within the knowledge of the carrier and proof adequate to furnish a basis for the contention should have been offered—if, indeed, the carrier could have been heard to insist that private cars should have been counted when its own rule, as well as the general practice in the United States, was to exclude them in calculating the number of coal cars to which each mine was entitled. Neither need we inquire whether the fact that the Commission subsequently announced a rule, under which private cars had to be taken into account in making the distribution, could be given a retrospective effect. For, be that as it may be, the exception was properly disallowed, because, as held by the Supreme Court of Pennsylvania, no relevant evidence was offered to support the contention, and no point was raised during the trial, that private cars should be counted in the distribution.

Judgment affirmed.